U.S. Supreme Court.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 884

HARRY SACHER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays for a writ of certiorari to review a judgment of the United States Court of Appeals for the District of Columbia Circuit which affirmed a judgment of the United States District Court for the District of Columbia convicting the petitioner of violating Title 2, United States Code, Section 192.

Opinions Below

The opinions of the trial court denying petitioner's pretrial motions and holding him in contempt are reported at 139 F. Supp. 853, 855 and appear in the record at R. 64-74, 75-80.

The opinion of the court below is reported at 240 F. 2d 46 and is attached hereto as Appendix B.

Jurisdiction

The judgment of the Court of Appeals was entered on January 3, 1957 (Appendix A, *infra*), and a petition for rehearing was denied on February 6, 1957. By order of Mr. Chief Justice WARREN, the time for filing a petition for certiorari was extended to April 5, 1957. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U. S. C. 1254(1).

Questions Presented

Petitioner, a lawyer, was subpoenaed to appear at an investigation of the Subcommittee on Internal Security of the Senate Judiciary Committee. The question under investigation was the recantation of one Harvey Matusow, a former witness before the subcommittee, and the circumstances leading to it. The chairman of the subcommittee had announced that the subcommittee would not be sidetracked into any other matter. At the hearing, conducted by two members of the subcommittee, petitioner, who then represented clients in a pending motion for a new trial based upon an affidavit by Matusow, protested his interrogation in general, on the grounds that it dealt with a matter then *sub judice* and invaded freedom of advocacy. He was thereafter asked three questions which he declined to answer, dealing with his past and present membership in the Communist Party. When he specifically sought the reasons for the pertinency of those questions, the chairman of the subcommittee likewise expressed doubts that the questions were pertinent to the announced subject under inquiry. The subcommittee counsel then explained that the questions were pertinent to the subcommittee's consideration of a measure barring Communists from practice in the Federal courts. The questions were then asked as a "foundation" for interrogation concerning this new subject matter.

The questions raised by petitioner are:

1. Whether a subject matter which was specifically excluded at a committee hearing as the basis for asking particular questions, can thereafter, in a prosecution under 2 U. S. C. 192, be relied on to justify the pertinency of these questions.

2. Whether the statute requires that the questions be pertinent to the question then actually under inquiry or whether it is sufficient that they fall within the scope of the resolution defining the jurisdiction of the committee.

3. Whether under the Senate rules two members of a nine-member congressional committee constituted a quorum for the purpose of initiating a subject for investigation or departing from a previously announced subject of investigation.

4. Whether, under the circumstances of this case, testimony to establish the nature of the question under inquiry was properly admitted at petitioner's trial under the contempt statute, when such testimony was at variance with the scope of the question under inquiry as communicated to petitioner at the hearing.

5. Whether the record in this case demonstrates beyond a reasonable doubt that petitioner refused to answer questions pertinent to a question under inquiry.

6. Whether the Resolution creating the Subcommittee on Internal Security of the Senate Judiciary Committee is unconstitutional on its face or as applied in that

(a) it exceeds the investigative or legislative power of Congress;

(b) it is too vague and indefinite;

(c) it abridges rights secured to petitioner by the First Amendment;

(d) it violates the principle of separation of powers; or

(e) it abridges the right to counsel.

7. Whether an indictment under 2 U. S. C. 192 is insufficient because it fails to allege or specify

(a) that the refusal to answer questions was deliberate or intentional;

(b) that the matter under inquiry was within the committee's delegated authority; or

(c) the nature of the question under inquiry to which the *ad hoc* questions are alleged to be pertinent.

8. The grand jurors who concurred in finding the indictment included eleven government employees and two housewives who might have been wives of government employees. The question presented is whether petitioner made a sufficient showing of bias on the part of these grand jurors to entitle him to a hearing on the issue.

Statute and Resolutions Involved

R. S. 102, as amended by c. 594, Act of June 22, 1938, 52 Stat. 942, 2 U. S. C. 192 provides:

> "Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 or less than $100 and im-

prisonment in a common jail for not less than one month nor more than twelve months."

Senate Resolution 366, 81st Cong., 2d Sess., established the Subcommittee on Internal Security of the Committee on the Judiciary of the United States Senate and authorized that subcommittee to make a "study and investigation" of the following:

"(1) The administration, operation and enforcement of the Internal Security Act of 1950;

(2) The administration, operation and enforcement of other laws relating to espionage, sabotage, and the protection of the internal security of the United States; and

(3) The extent, nature and effects of subversive activities in the United States; its territories and possessions, including, but not limited to, espionage, sabotage, and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world Communist movement or any other movement seeking to overthrow the Government of the United States by force and violence." *

Section 2 of the Resolution provides as follows:

"A majority of the members of the committee, or duly authorized subcommittee thereof, shall constitute a quorum for the transaction of business, except that a lesser number, to be fixed by the committee, or by such subcommittee, shall constitute a quorum for the purpose of administering oaths and taking sworn testimony."

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* Also invoked by the indictment is Senate Resolution 58 (84th Cong., 1st Sess.) which repeats the language of Senate Resolution 366.

Senate Resolution 180, 81st Cong., 2d Sess. amended subsection (3) of Rule XXV of the Standing Rules of the Senate, to read as follows:

> "3(a) Except as provided in paragraph (b) of this subsection, each standing committee, and each subcommittee of any such committee, is authorized to fix the number of its members (but not less than one third of its entire membership) who shall constitute a quorum thereof for the transaction of such business as may be considered by said committee subject to the provisions of Section 133(d) of the Legislative Reorganization Act of 1946.
>
> (b) Each standing committee, and each subcommittee of any such committee, is authorized to fix a lesser number than one third of its entire membership who shall constitute a quorum thereof for the purpose of taking sworn testimony."

The new matter introduced by Resolution 180 is subparagraph (b).

Statement of the Case

1. The proceedings before the Subcommittee on Internal Security.

Petitioner, a practicing attorney for more than thirty years (R. 56), was subpoenaed on April 19, 1955, to appear before the Subcommittee on Internal Security of the Senate Judiciary Committee (hereinafter called the subcommittee) which, since February 21, 1955, had been conducting an investigation in connection with the recantation of the testimony of one Harvey Matusow. At the time of his appearance, petitioner was counsel for a group of defendants who had moved for a new trial after having been convicted in the United States District Court for the Southern District of New York for violation of the Smith Act.

United States v. *Flynn*, 216 F. 2d 354, cert. denied 348 U. S. 909.

This motion for a new trial, based upon an affidavit of the witness Matusow recanting his original testimony in the case, had been filed for the defendants by their attorney of record, petitioner appearing as their counsel only after the motion had already been filed (R. 50). At the time of his appearance before the subcommittee, the motion for a new trial was still pending before Judge DIMOCK in the Southern District of New York (R. 46).*

The matter under inquiry by the subcommittee was expressly set forth by Senator Eastland, the chairman of the subcommittee, at the beginning of the investigation on February 21, 1955. Senator Eastland then stated that the witness Matusow had previously appeared before the same subcommittee and had given sworn testimony on the subjects of the Institute of Pacific Relations, "certain youth organizations", and the International Union of Mine, Mill and Smelter Workers. The chairman further recited that "Mr. Matusow has since made public statements recently to the effect that he lied when he testified before this subcommittee and on other occasions. The purpose of the hearing now commencing is to inquire into this whole matter" (R. 100).

The chairman concluded his statement concerning the purpose of the hearing as follows: "The subcommittee in this series of hearings hopes to determine what is the truth. The subcommittee may be able to show, in some instances, what are lies. The subcommittee probably can and will try to make a record as to just what Mr. Matusow now says the truth is. The subcommittee also will seek to

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* Shortly after petitioner's appearance before the subcommittee, Judge DIMOCK granted the motion and ordered a new trial for certain of the defendants represented by petitioner, *United States* v. *Flynn*, 130 F. Supp. 412.

determine, from the testimony of this witness and others, all of the facts surrounding this case, and to make as complete a record of these facts as possible.

> "The subcommittee does not propose to be sidetracked into any examination or consideration of matters not involved with the testimony of Harvey Matusow, his public utterances, and the preparations and publication of the book soon to be published under his name" (R. 103).

Thus, when petitioner appeared on April 19, the subcommittee had authoritatively announced the nature and limitations of its investigation. At the time of petitioner's testimony, no new announcement was made that the subject matter of the investigation as previously defined had been enlarged or altered (R. 40).* Petitioner was first asked in what way he had been "associated with the defense of Communist cases" for the purpose of identifying him "as of counsel in certain prominent cases which have involved leaders of the Communist Party" (R. 41-42). Petitioner protested on the ground that the question did not appear to be relevant to any legislative purpose and jeopardized the independence of the bar (R. 43-44). When petitioner was directed to answer questions about his professional practice, he declined to answer without some further information as to the purpose of these inquiries. He was told by the chairman that "the Chair does not necessarily feel called upon to give you all the information that you may desire" (R. 43). The only light which the subcommittee was willing to shed on the pertinency of the questions concerning petitioner's professional practice is

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* At petitioner's hearing on April 19, 1955, only two members of the nine-man subcommittee, namely, Senators McClellan and Jenner, were present (R. 39-40). The transcript of petitioner's testimony before the subcommittee was introduced into evidence at the trial and appears at R. 40-59.

reflected in the chairman's holding that "any questions which may be asked you regarding anything associated with the subversive elements in this country, if there are such, is a pertinent question, and it is pertinent to this inquiry" (*id.*).* Petitioner thereupon again appealed to the chairman to refrain from exacting disclosures which might compromise freedom of advocacy (R. 44). Upon being further informed that these questions were merely preliminary, he withdrew his objection and answered the questions.

Petitioner was then interrogated about a document which he had received from Matusow and which had been offered in evidence in support of the motion for a new trial (R. 45-46). After fruitlessly pointing out to the subcommittee the impropriety of calling upon him, as counsel in the case, to discuss matters which were then *sub judice* (R. 45-46), petitioner answered all questions concerning his activities in connection with the motion for a new trial and his relationships with the witness Matusow. He testified that he first met Matusow in a purely professional capacity *after* Matusow's recanting affidavit had been filed and two days before Matusow took the witness stand on the motion for a new trial.

He further testified that he had no knowledge of or any connection with Matusow's recantation of other testimony or with a book written by Matusow in which he discussed generally his career as a false witness. Petitioner also stated that he had not participated in the preparation of the motion for a new trial itself or in securing Matusow's affidavit which was attached to the motion for new trial and that he had only come into the proceedings as trial counsel after the motion had been filed and the matter set for hearing (R. 44-50).

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* This appears to be a capsule paraphrase of clause 3 of the basic resolution defining the subcommittee's jurisdiction (*supra*).

After the completion of petitioner's testimony concerning the matter upon which he had been summoned, *i.e.*, the recantation of Matusow, the following questions were put to him which served as the basis for the contempt conviction below. The questions and petitioner's responses are set out below as they appear in the official transcript of the hearing before the subcommittee (R. 50-57):

> Mr. Sourwine. Mr. Sacher, have you ever served a prison sentence?
>
> Mr. Sacher. Mr. Chairman, is that question related to some legislative purpose? I wonder.
>
> Senator McClellan. The Chair will hear counsel. I was not just certain what the purpose of it was.
>
> Mr. Sourwine. Mr. Chairman, among the measures under consideration by this committee is proposed legislation for the purpose of fixing additional standards with respect to the practice of law in the Federal courts. Among the suggestions for inclusion in such legislation is one which would prohibit members of the Communist Party from practicing in Federal courts. It is germane to the consideration of such legislation to inquire into the circumstances involving the practice of law in Federal court by persons who are Communists and by persons who are defending Communists. I believe that the inquiries made here and other inquiries which have been made and which will be made in this Matusow case have bearing upon that legislative problem now pending before the committee.
>
> Mr. Sacher. I would like to be heard, Mr. Chairman, if I may.
>
> Senator McClellan. The Chair thinks that you should lay a foundation for that first by asking the witness if he is a member of the Communist Party, if he has ever been, and so forth.
>
> Mr. Sacher. Mr. Chairman, may I be heard, please?
>
> Senator McClellan. Briefly.

Mr. Sacher. Mr. Chairman, my understanding, when I came here, was, as given to me by those who served the subpoena to me, that I was going to be interrogated concerning the Matusow recantation. I believe, and I say this with as much of a sense of responsibility as 30 years of practice at the bar have given me, that I have established rather conclusively by evidence other than Matusow's own recantation before Judge Dimock, that he lied and lied outrageously at the Flynn trial, and I should like the opportunity before I leave the stand today to file with your committee, Mr. Chairman, copies of the briefs that I filed with Judge Dimock and copies of some 13 exhibits that I prepared to demonstrate the falsity of Matusow's testimony at the Flynn trial.

The suggestion that my political beliefs or associations are to be inquired into seems to me to be diversionary in character. I maintain that Matusow lied and that, if this committee wants to know how our judicial procedures may be improved, let them wait until Judge Dimock passes judgment on everything that transpired before him. Let there not be here made an attempt to prejudice the determination not only by Judge Dimock, but by the people of the United States as to whether or not Matusow lied when he testified at the Flynn trial. Now I submit, Mr. Chairman, that this—if I may say so—that this is doing a disservice to the administration of justice.

Senator McClellan. That is what we are trying to find out. Now let us proceed, Mr. Counsel, and ask the proper questions to lay the foundation for this.

Mr. Sourwine. Are you, Mr. Sacher, a member of the Communist Party, USA? [Count 1]

Mr. Sacher. Mr. Chairman, I have been called here because of my representation of the defendants in United States against Flynn on a motion for a new

trial on the ground that Harvey Matusow committed perjury in their trial. I have answered and am prepared to answer all questions concerning my participation in that case. I refuse. I refuse categorically, Mr. Chairman, to discuss my beliefs, religious, political, economic, or social. I do not do so on the ground of the fifth amendment. I do so because it is inconsistent with the dignity of any man to be compelled to disclose his political, religious, economic, social, or any other views. And I respectfully submit that an inquiry to me concerning this matter is not pertinent to anything with which this committee is concerned, and is not relevant to any inquiry that may properly be made of me. And I therefore decline on the ground that I cannot with any regard for my own self-respect, do otherwise, Mr. Chairman.

Senator McClellan. Well, the Chair does not think that it is beneath the dignity of a good citizen of the United States to answer a question as to whether he is a member of an organization that seeks the overthrow of this Government by force and violence and therefore, the Chair propounds to you now the question, Are you now a member of the Communist Party of the United States?

Mr. Sacher. Mr. Chairman, medieval inquisitors also thought there was no impropriety in asking those whom they regarded as heretics to answer the question.

Senator McClellan. The Chair does not care for a lecture. The Chair asked you a question.

Mr. Sacher. And I decline to answer that question, Mr. Chairman.

Senator McClellan. The Chair orders you to answer the question.

Mr. Sacher. I decline to answer that question on the grounds I have already stated.

Senator McClellan. The Chair asks you another question. Have you ever been a member of the Communist Party of the United States? [Count 2]

Mr. Sacher. I respectfully submit, Mr. Chairman, that my conscience dictates to me that I shall not, under your compulsion or anybody else's compulsion, make any disclosure of any of my beliefs, political, religious, economic, or social, past or present, and I decline to answer your question.

Senator McClellan. The Chair orders you to answer the question.

Mr. Sacher. I respectfully decline to answer it.

Senator McClellan. The Chair asks you another question. Have you ever been a member of any organization, Communist Party or by any other name, that advocates and seeks the overthrow of the Government of the United States by force and violence?

Mr. Sacher. I will state to the Chair that I have never been a member of any organization which I believed to be a teacher or advocate of the forcible or violent overthrow of the Government of the United States.

Senator McClellan. All right, you may proceed.

Mr. Sourwine. Have you ever served a prison sentence?

Mr. Sacher. I have, sir. I am sure that that will be most illuminating for the legislative purposes that the committee has in mind.

Mr. Sourwine. What was that sentence for?

Mr. Sacher. I was sentenced for contempt of court.

Mr. Sourwine. Have you ever been disbarred?

Mr. Sacher. No, sir.

Mr. Sourwine. Have you ever been ordered disbarred?

Mr. Sacher. An order was made but was reversed by the Supreme Court of the United States. You see, Mr. Chairman, counsel is not interested in eliciting

the truth. He is interested in smearing me, and so although he knows that the Supreme Court of the United States reversed my disbarment, he asks me only whether I was disbarred, and I respectfully submit it is unworthy of the great functions of a Senate investigating committee to do that.

Senator McClellan. The Chair thinks you have a perfect right to make that explanation.

Mr. Sacher. I beg your pardon?

Senator McClellan. The Chair thinks you have a perfect right to make that explanation, sir.

Mr. Sacher. Thank you, Mr. Chairman. Thank you.

Senator McClellan. Proceed.

Mr. Sourwine. Did you, Mr. Sacher, ever attend a gathering of leaders of the Communist Party, U.S.A.?

Mr. Sacher. Well, I defended leaders of the Communist Party of the United States of America in United States against Dennis, and I imagine I must have attended such meetings, certainly. That is what you do when you defend clients, Mr. Counsel. You meet with them occasionally.

Mr. Sourwine. Did you ever attend a gathering of leaders of the Communist Party who were not your clients?

Mr. Sacher. I am not aware of it.

Mr. Sourwine. Did you attend a birthday party of Alex Bittelman in January 1950?

Mr. Sacher. I do not remember.

Mr. Sourwine. Did you attend a birthday party for Alex Bittelman in January 1950 in the board room at the Communist headquarters on the ninth floor in New York?

Mr. Sacher. I don't remember. I should say to you, Mr. Counsel, that you are speaking of a period when the Dennis case was in full progress, and I cannot say whether I was in a building where a birthday

party may or may not have been taking place at the time.

Mr. Sourwine. Did you attend a birthday party for Alex Bittelman at which Henry Winston proposed a toast, "Comrades, let's drink a toast to Alex"?

Mr. Sacher. I have no recollection of that.

Mr. Sourwine. Do you have any connection with the legal commission or law commission of the Communist Party?

Mr. Sacher. I do not know of any such organization so I cannot say anything about it.

Mr. Sourwine. Are you now or have you ever been a member of the Lawyers' Section of the Communist Party, U.S.A.? [Count 3]

Mr. Sacher. Mr. Chairman, I have declined before and I decline again—

Senator McClellan. You are ordered to answer the question.

Mr. Sacher. On the grounds that I have already stated so I need not take the time of the committee, and I reemphasize that there is nothing in the purposes of the committee or the Congress, which comprehends the validity, the pertinence, or the relevance of an inquiry to me concerning my political beliefs or affiliations. I respectfully decline to answer that question.

Senator McClellan. May I say to you I have great respect for the law profession. I have tried to practice a little law myself. But when we come to the security of our country, an organization that is dedicated obviously to subversive purposes as an objective, I think it becomes the duty of the Congress of the United States and also the duty of the executive branch of the Government to try to ferret these things out and expose them if they relate directly to the national security—associations, at some time, and the knowledge of them, may help the Congress or help

other officials of the Government to preserve national security. For that reason the Chair thinks that the question is proper and directs you to answer it.

Mr. Sacher. Mr. Chairman, I respectfully say to that, without any desire to be immodest, I think that in the defense of those that have been charged under the Smith Act or under the Internal Security Act of 1950, I have acted in the best traditions of the profession by defending the rights of people to speak, to publish, to meet under the first amendment.

Senator McClellan. This question was not related to your defending anyone in court. The question was related to your being present or being a member of a group of lawyers, presumably, ostensibly from the question—I do not know what the answer is—dedicated to the Communist Party.

Mr. Sacher. Mr. Chairman, for 30 years I have practiced law in the State of New York and elsewhere in the United States, and I think again, without being subject to the charge of being immodest, that I have done a yeoman's share of the work that had to be done on behalf of the working men and women of our country. And I feel that my life is a living testimonial to what I am and to what I have done for my country, and I respectfully submit that it is a late time of the day for me to have to appear before anybody, after 30 years of honorable practice, to testify to my loyalty to the democratic institutions of the United States, and I unswervingly and unhesitatingly tell you my devotion is to the best interests of my country. And I believe I am serving those interests when I refuse to bend the knee to an inquiry concerning my innermost thoughts and beliefs, whether they be on politics, religion or anything else. My conscience dictates to me that I shall not, under compulsion answer today any more than John Freeborn Lilliburne answered in the 1640's to the Court of Star Chamber and on the same

grounds, Mr. Chairman, on the grounds that it is incompatible with the dignity of the individual to make compulsory disclosure of his thoughts and his ideas and his beliefs, I must respectfully decline to answer that question.

Senator McClellan. You have a right to decline, of course, if you wish to invoke your constitutional privilege.

Mr. Sacher. I am invoking my rights as a man and my dignity as a man and I am not invoking any privileges against self incrimination. I have never done anything and I pledge you, Mr. Chairman, I shall never do anything which, so far as I can help, will expose me to any criminal charges.

And I say to you that I speak not from fear of incrimination or prosecution. I speak only from the dictates of conscience. And I ask all Americans to join me in resisting inquiries of this kind, for when the day comes when Americans will resist inquiries of this kind, we shall once again witness a restoration of those liberties which we so long enjoyed prior to the advent of the suppression of them.

Senator McClellan. Now you have made your speech. You are ordered to answer the question.

Mr. Sacher. I respectfully decline, Mr. Chairman.

Senator McClellan. All right, proceed, Mr. Counsel.

Mr. Sourwine. Mr. Chairman, may I ask that the witness be ordered to answer that question?

Senator McCellan. I ordered the witness to answer the question. He declined. The record so shows. Proceed.

It will be noted that petitioner declined to make the disclosures involved here solely on the grounds that they were not pertinent and that they invaded an area protected by the First Amendment. Most important is the fact that petitioner declined to make these disclosures only after it

was made clear to him that the purpose of the interrogation into his political views and associations was solely and exclusively to aid the consideration of legislation barring Communists from the practice of law in the Federal courts (R. 50). No attempt was made to justify the pertinence of the questions to the announced subject under inquiry. In fact, petitioner's objection to the new line of questioning* was met not by a claim that it was linked to the Matusow recantation but that it was germane to a subject matter entirely different from that then under inquiry.**

2. The proceedings below.

Petitioner was indicted on a three-count indictment for refusal to answer the following three questions put to him by the subcommittee: (1) "Are you, Mr. Sacher, a member of the Communist Party, U.S.A.?"; (2) "Have you ever been a member of the Communist Party of the United States?"; (3) "Are you now or have you ever been a member of the Lawyers' Section of the Communist Party, U.S.A.?" (R. 2-3).

Prior to the opening of the trial, petitioner moved to dismiss the indictment on the broad ground that it failed to allege an offense against the United States (R. 3). Petitioner also moved for a bill of particulars (R. 4) setting forth the matter under inquiry as to which each of the three questions was allegedly pertinent, the manner in which each of the questions was claimed to be pertinent to such matter under inquiry and the legislative purpose of the matter under inquiry. Further, a motion was filed,

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* We refer to the series of questions beginning with (R. 50), "Mr. Sacher, have you ever served a prison sentence?"

** Indeed, the questions here in issue were specifically asked in response to the direction of the chairman to "lay a foundation" for an exploration of this newly-advanced subject matter dealing with political qualifications for practicing law in the Federal courts.

accompanied by an offer of proof, challenging the qualifications of Government employees to sit on the grand jury and requesting a hearing to establish the bias of such grand jurors (R. 4-9). The motions were denied (R. 9).

At the trial, the sole witness presented by the Government to establish the pertinency of the questions to the subcommittee's inquiry was Mr. Sourwine, counsel for the subcommittee. Asked to identify the subject under inquiry at the time that petitioner was called, he stated (R. 11), "The committee was engaged in its continuing investigation into the scope, the extent, and the effect of subversive activity in the United States".* In support of the thesis that the questions involved here were rendered pertinent by the subcommittee's continuing at-large investigation into "subversive activity," this witness testified that the subcommittee hoped to secure testimony from petitioner concerning his alleged subversive activity in the following areas:

The subcommittee had information that a record containing a cross-examination by petitioner of Louis Budenz, a Government informer, had come into the possession of the attorneys for Owen Lattimore (R. 13, 15, 24). An attorney named Fanelli had testified before the subcommittee in 1952 that he had supplied this document to counsel for Mr. Lattimore. Mr. Sourwine testified that the subcommittee sought to learn whether (R. 24) "Mr. Fanelli's version of how Mr. Lattimore got the document * * * or whether the belief of the committee that it had been given by Mr. Sacher" was true. This, according to the testimony, was

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* The equating of the subject matter of the committee's investigation with its general jurisdiction as set forth in clause three of its basic resolution is further seen by the witness' testimony (R. 12): "The committee had testimony in its record dating back from 1952 with respect to activity of Mr. Sacher bearing on the subject of the committee's inquiry, that is, subversive activity."

a most pressing reason for calling petitioner. Yet he was asked nothing at all about this matter.*

The second matter about which the subcommittee purportedly wanted to ask petitioner was his alleged presence at a birthday party for one Alexander Bittelman at which high functionaries of the Communist Party were said to have been present (R. 25).** A third subject which allegedly gave pertinency to the questions which petitioner declined to answer was his claimed connection with a number of organizations.***

Curiously enough, petitioner was not questioned concerning his relationships to these organizations, nor was he asked about a fourth accusation, namely, that he participated as a pallbearer at the funeral of one Joseph Brodsky, who assertedly was "a well known Communist" (R. 28).

The remainder of Mr. Sourwine's testimony (R. 29-40) deals with information allegedly in the subcommittee's files concerning the Matusow recantation. According to this testimony, the subcommittee had established, prior to calling petitioner, that a plan for obtaining a recanting affidavit from Matusow had been conceived by two other

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* This matter was probed by the subcommittee at some length in its hearings on the Institute of Pacific Relations in 1952, but petitioner was not subpoenaed in connection with those hearings (R. 64).

** Petitioner was asked at the hearing about his presence at this affair and responded that he had no recollection of it (R. 54-55).

*** Those enumerated by Mr. Sourwine included the following (R. 25-28): American League for Peace and Democracy, International Labor Defense, Civil Rights Congress, Jefferson School of Social Science, Lawyers Committee on American Relations with Spain, National Council of Arts, Sciences and Professions, National Lawyers Guild, School for Democracy, Workers School, Painters Committee for the Defense of Louis Weinstock, and the Connecticut Committee to Aid the Victims of the Smith Act.

lawyers (R. 30; G.E. 12, R. 94), who were counsel in another case in which Matusow had testified, *Jencks* v. *United States*, 226 F. 2d, 553 (C. A. 5), cert. granted 350 U. S. 980. Mr. Sourwine testified that the subcommittee had established that as a means of obtaining an affidavit from Matusow in the *Jencks* case (R. 30), the two attorneys decided to get him to write a book which would be financed by a labor organization. The subcommittee assertedly was pursuing the hypothesis that the compensation for the book was a way of paying for the affidavit (R. 34). But it had no information that petitioner was involved in the transfer of funds to Matusow and indeed knew that he had no part in the payment for Matusow's book (R. 34-35). Although the subcommittee concededly knew that petitioner had nothing to do with the book or its financing, Mr. Sourwine testified that the subcommittee nevertheless was interested in what petitioner knew about "the whole scheme" and to what extent he "participated in the planning for the strategy of it" (R. 35).

The suspicion, inspired by the manner in which the testimony was elicited,* that the justification for the pertinence of the question was an afterthought is well-grounded in the simple circumstance that petitioner was not asked a single question at the hearing either about the book or about its financing!

In the same way, when first asked what information the subcommittee possessed concerning petitioner's connection with an alleged conspiracy to discredit Government witnesses and to secure new trials for convicted Communists, Mr. Sourwine replied (R. 31), "The only connection

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* Mr. Sourwine originally stated (*supra*) that the subcommittee knew that petitioner had nothing at all to do with the financing of the book. The "scheme" or "plot" theory was advanced when the witness was pressed (R. 35) to qualify his original unequivocal answers.

that the committee had information of in its files at that time was that Mr. Sacher had received the affidavit and certain other papers from Mr. Matusow" for use in seeking a new trial in the *Flynn* case.

Again it apparently became necessary to dilute this unequivocal answer. Pressed further about the connection of petitioner to Matusow's recantation, Mr. Sourwine testified (R. 33, 36) that the subcommittee had information that the Matusow recantation and the writing of the book, as well as the "whole drive" to discredit Government witnesses, including "the coining of the phrase 'informer'," were all planned by a group of lawyers in the Communist Party, of which petitioner was one.

But, as we have seen, the pertinency of the questions here in issue was justified at the hearing on a wholly different basis,* namely, on the basis of proposed legislative

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* In addition to the fact that the "conspiracy" theory was not mentioned at the hearing and that the testimony about it at the trial was vague and contradictory, the report of the subcommittee (G. E. 12), which covers some 110 pages and contains detailed findings on the recantation, does not connect petitioner with Matusow aside from his participation as counsel in the *Flynn* case. Nor is this pertinency rationale fortified by Mr. Sourwine's testimony at the trial concerning the information in the possession of the subcommittee on the alleged conspiracy. The following is all the evidence in the record dealing with the existence of this "conspiracy":

The subcommittee assertedly had information that petitioner occupied offices in the same suite as the author of an article which appeared in *The Nation*, attacking the credibility of informers (R. 34); that in 1947 petitioner had attended a meeting at the home of one of the publishers of the Matusow book which was also attended by a Communist section leader (R. 36); that the affidavit had been notarized by an attorney who had been associated with petitioner in the *Flynn* case and typed by that attorney's wife after having been dictated in substantial part by another attorney who was also a lawyer in the *Flynn* case (R. 37).

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restrictions upon the practice by Communist lawyers in the Federal courts (R. 37-38).

The case was tried before Judge HOLTZOFF without a jury. The trial court found petitioner guilty on all three counts (R. 10; 139 F. Supp. 855) and sentenced him to imprisonment for six months and a $1,000 fine (R. 10). The lower court affirmed. In contrast to the trial court which had justified the pertinency of the questions on the ground that they fell within the subcommittee's general jurisdiction (139 F. Supp. at 859-860), the court below found that the "conspiracy" theory brought these questions within the announced subject matter of the inquiry (240 F. 2d at 53). Beyond stating that there was no "abandonment" of the Matusow inquiry by the references to standards governing Federal law practice, it wholly failed to deal with the contention that this was the exclusive justification advanced to petitioner when he challenged the pertinency of the questions in issue. This ruling made it unnecessary for the court to reach our contention that there was no power in the subcommittee to initiate an inquiry into a new and unrelated subject matter. The court also upheld the validity of the indictment and of the subcommittee's basic resolution.

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But the witness was never asked at the hearing about his relationship to the *Nation* article or to the individuals allegedly involved in preparing and notarizing the affidavit. And the meeting in 1947 was eight years before the affidavit was filed.

Reasons for Granting the Writ

I. The record establishes beyond a reasonable doubt that the questions were not pertinent to a matter properly under inquiry.

It should be pointed out preliminarily that the issues framed by our contentions concerning pertinency are not issues of fact but involve, rather, problems which have become increasingly pressing in the administration of an important federal statute. These are, first, the weight to be given in a subsequent trial for contempt to a committee's statements to a witness at a hearing that a particular subject matter is under inquiry. The decision of the court below reflects a serious misconception with respect to this matter. Cognate to this issue is the question of the relationship of a committee's basic resolution to the pertinence of the *ad hoc* questions a witness is called upon to answer. The trial court mistakenly assumed that the basic resolution of the subcommittee, despite its breadth and vagueness, supplies a protean justification for exacting compulsory disclosures about anything colorably describable as "subversive activity" regardless of the way the subcommittee itself justified the pertinency of the questions at the hearing. But the conviction cannot be permitted to stand on this theory without disfiguring the contempt statute, the Fifth Amendment requirement that criminal statutes must impose a reasonably ascertainable standard of guilt, and the First Amendment prohibition against vaguely worded limitations upon freedom of expression.

A. Under the contempt statute a witness is warranted in relying on a committee statement to him that questions are not pertinent to the announced subject under inquiry.

1. Not all refusals to answer questions in a hearing before a duly authorized congressional committee are punishable criminally. Title 2, U. S. C., Section 192, which is

invoked by the indictment in this case, punishes only the refusal to answer questions which are "pertinent to the question under inquiry" before such a committee. And it is well-established that there is no presumption of pertinency; it must be pleaded and proved by the prosecution.*

2. Accordingly, where, as here, the pertinency of the questions was put in issue, a preliminary question arises as to what was "the question under inquiry." We do not urge that there is in all cases some fixed or mechanical way to ascertain the nature of the question under legislative inquiry. In this case, however, there is no room for debate about this matter because when the hearings began on February 21, 1955, the scope of the investigation or the "question under inquiry" was defined by the chairman of the subcommittee as dealing with the truth or falsity of the testimony given by one Harvey Matusow both before the subcommittee and elsewhere, and the circumstances leading to Matusow's recantation of such testimony. The chairman stated that the inquiry would be limited to that subject and that "The subcommittee does not propose to be sidetracked into any examination or consideration of matters not involved with the testimony of Harvey Matusow, his public utterances, and the preparation and publication of the book soon to be published under his name" (R. 99-103). This statement by the chairman of the subcommittee was made at a public hearing at which six of the nine members of the subcommittee were present (R. 99). It authoritatively defined the "question under inquiry."**

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* *Sinclair* v. *United States*, 279 U. S. 263, 297; *United States* v. *Rumely*, 345 U. S. 41; *Bowers* v. *United States*, 92 App. D. C. 79, 202 F. 2d 447.

** *Slochower* v. *Board of Higher Education*, 350 U. S. 551; *Watkins* v. *United States*, 233 F. 2d 681 (App. D. C.), cert. granted 352 U. S. 822; *United States* v. *Kamin*, 135 F. Supp. 382, 386-387 (D. C. Mass.); *United States* v. *Kamin*, 136 F. Supp. 791, 795 (D. C. Mass.).

3. Ordinarily, the witness—almost always a layman—does not raise the question of pertinency at the hearing, and the issue of pertinency is dealt with for the first time at the trial of the witness for contempt through testimony by a committee representative as to the reasons, which the witness could have presumably learned at the hearing, for asking the particular questions resulting in the indictment. A court decides upon the basis of this testimony and the record of the hearings before the committee whether the questions were in fact pertinent.

4. In this case, petitioner, a lawyer, challenged at the hearing itself the pertinency to the subject matter under inquiry of the line of questions which resulted in the indictment (R. 50-52).

The chairman, a skilled and experienced investigator, apparently shared petitioner's doubts as to pertinency (R. 50): "The chair will hear counsel. I was not just certain what the purpose of it was." Petitioner was then informed by the committee counsel that these questions were germane to a measure under consideration by the subcommittee barring Communists from practice in the Federal courts (R. 50-51). Following this statement, the chairman instructed counsel (R. 51) to "lay a foundation" for an exploration of this new subject by asking the questions here in issue.

In short, the subcommittee not merely neglected to tell petitioner that the announced subject matter—the Matusow recantation—justified the new line of questioning, or that a theory of a Communist conspiracy to discredit witnesses generally was embodied within the announced subject under inquiry. Rather, he was affirmatively told that an altogether different subject made the questions germane.

5. A witness cannot be criminally punished for declining to answer committee questions pertinent to a question

other than that which is properly under inquiry.* A witness "rightfully may refuse to answer where the bounds of the power are exceeded or the questions are not pertinent to the matter under inquiry." *McGrain* v. *Daugherty*, 273 U. S. 135, 176. It is true that if his legal judgment as to the pertinency of particular questions is subsequently determined to be erroneous by the courts, he is guilty of contempt. *Sinclair* v. *United States*, *supra*. But he is entitled to make his decision on pertinency, at the risk of being found guilty of contempt if wrong, on the basis of the statements communicated to him at the hearing. And he can only make his decision on the basis of what is communicated to him by the committee.

6. The issue in this criminal case is not, as the court below erroneously assumed (240 F. 2d at 49-51) whether, after the hearing, a case of pertinency could be made out by putting a gloss on the announced subject under inquiry, or dredging the record for evidence of a connection—which the subcommittee itself did not make—between the questions and the announced subject under inquiry.** The issue must necessarily be: What should the witness rea-

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* As we show *infra*, the subject of qualifications of lawyers to practice in the Federal courts was not properly under inquiry.

** The extent to which the court below strained to find pertinency is reflected in the fact that its decision with respect to pertinency rests on a mistake of fact. The opinion states (240 F. 2d at 50): "There was further information that appellant Sacher was one of the lawyers within the Communist Party who had formulated this plan [i.e., the plan to obtain the Matusow recantation], and that he probably was one of the two leaders." Again the opinion states that the subcommittee had information in the form of "reports linking appellant with this alleged conspiracy," i.e., to bring about the Matusow recantation.

These statements, which furnish the factual basis for the court's finding of pertinency, are not supported by the record. On the con-

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sonably have believed was the basis for the pertinency of the questions? Here he was told that pertinency was founded solely on the subject matter of lawyers' qualifications to practice. He could hardly be required to disregard what he was expressly told by the committee about the pertinency of the questions. The construction of the statute by the lower court would deprive a witness at a hearing of any reliable means of ascertaining the basis for pertinency. This would transform the statute into an ambush.

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trary, the record shows that the subcommittee had no information linking petitioner with Matusow or his recantation other than petitioner's participation as counsel in the *Flynn* case. This appears from the categorical statement made by Sourwine at the trial (R. 31):

> "Q. Can you move on to the information the committee had with respect to Mr. Sacher's activities [concerning the Matusow recantation], if any? A. The only connection that the committee had information of in its files at that time was that Mr. Sacher had received the affidavit and certain other papers from Mr. Matusow.
>
> Q. In which case? A. In the trial of the Elizabeth Gurley Flynn, et al., the trial of the Smith Act defendants in New York, for the purpose of using those papers and that affidavit in seeking new trials in those cases.
>
> The Court: Was he counsel in the case?
>
> The Witness: Yes, sir.
>
> *By Mr. Hitz*:
>
> Q. Any connection that he may have had with respect to the Jencks affidavit? A. The committee had no information that he was in any way connected with the Jencks affidavit."

The court may have been misled by an inaccurate statement in the Government's brief below (at p. 7) that, according to Mr. Sourwine, the subcommittee had information that the Matusow recantation "had been hatched" by two attorneys, petitioner and Witt. Mr. Sourwine did not so testify (R. 30). The report of the subcommittee (G. E. 12, R. 94) makes it clear that the two attorneys referred to were Witt and McTernan.

Moreover, as we have seen, *supra*, the subcommittee itself did not think that the line of inquiry here in focus could be justified on the basis of the announced subject matter. The lower court in *Watkins, supra*, stressed the great deference which courts must accord committee statements of investigative purpose. We have no quarrel with this. But in this case the lower court disregarded its own caution, denied validity to the subcommittee's statement as to the reasons for the questions in issue here and substituted its judgment for the subcommittee's as to why petitioner was required to answer the questions. We think this method of interpreting a criminal statute is indefensible.

7. There are urgent due process considerations which support the right of the witness to learn and impose upon the committee the correlative duty to communicate the nature of the matter under inquiry. It must be emphasized that this is a criminal case in which the Senate has chosen to punish a witness rather than coerce his answers.* And the statute authorizes punishment of the witness even if subsequent to his refusal he changes his mind and desires to purge himself. But a criminal contempt provision, and especially one in the area of congressional contempt, would be highly vulnerable on due process grounds if it made irrevocably punishable refusals without the prior opportunity to learn the reason why the questions were asked.

8. It would be hard to conceive a case in which the protections of the statute were more appropriately claimed.

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* The Senate might conceivably under its inherent contempt power have authority to punish for contempt even though it had refused to comply with a legitimate request for an explanation of the pertinency of a particular question or line of inquiry. Indeed, the chairman, at one point in the instant proceedings, seemed rather inclined to withhold any explanation of pertinency when petitioner sought enlightenment about it (R. 43): "Well, the Chair does not necessarily feel called upon to give you all the information you may desire." But, where the statute is invoked, pertinency must have been elucidated when the witness requested it.

The subcommittee had already indicated a disposition to abuse its powers by seeking to establish petitioner's "subversive" associations on the basis of his representation of clients. It then began to probe a matter which was not only *sub judice*, but involved departures from the scope of the committee's investigation. At every point in the questioning, petitioner was forced to resolve a conflict between his professional responsibilities and his desire to answer. Moreover, the questions sought to compel disclosures with respect to private matters and political views.* In fact, the whole context of the interrogation, as indicated by such questions as whether petitioner had ever been disbarred or served a jail sentence, reflected an effort to attack him personally and to humiliate him, rather than to elicit information about the Matusow affair. Petitioner was not merely warranted in seeking to limit the interrogation to pertinent matters—he was driven to it.

9. The dilemma into which petitioner was thus forced could only be resolved by a ruling on pertinency. "The citizen, when interrogated about his private affairs, has a right before answering to know why the inquiry is made * * *." *Jones* v. *Securities and Exchange Commission*, 298 U. S. 1, 26. The reason for this right is to permit the witness to decide whether the intrusion into his private affairs is warranted. This would be an empty right if the reasons advanced to him as to the purpose of the inquiry could subsequently be abandoned.**

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* The impact of the First Amendment upon the subcommittee's right to demand these answers is discussed below.

** If a witness did not have a right to rely on a statement of the reasons for pertinency, "this limitation on the [investigative] power" would be "largely illusory in practical operation." For "the witness is caught between two horns. If he answers a question which he honestly thinks is not pertinent he is allowing the committee to inquire into areas of his private life which may be unjustified by the

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10. Indeed, only by endowing a committee's statement of purpose with finality can a witness protect any of his rights. Thus here, the subject under inquiry was clearly defined by the subcommittee and petitioner was specifically notified as to what that subject was at the time he was subpoenaed (R. 51). Since it was obvious to petitioner that his connection with the subject under inquiry was at most tangential, he came prepared to explain to the subcommittee his small role in the whole matter. When the inquiry took a turn into an area seemingly unrelated to the announced subject matter, he raised the question of pertinency and then was presented with a new subject matter. Had he been told at the hearing that the subject under inquiry included a conspiracy of which he was allegedly a member, he might have viewed the matter differently. He might have answered the questions or he might have invoked his privilege against self-incrimination.*

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resolution authorizing the investigation. If he refuses to answer, in good faith, the committee may later cite him for contempt and he finds himself subjected to penalties for his original refusal even though he may now be willing to answer after a court ruling as to pertinency. Under present practices, few, if any, standards of pertinency are in fact available to the committee or the courts." American Bar Association, Special Committee on Individual Rights, *Report on Congressional Investigations* (1954), pp. 17-18.

* Indeed, if a congressional committee statement as to the reasons why particular questions are asked could not be relied on by the witness because it might subsequently be disregarded in a prosecution for contempt, the only recourse open to the witness would be a plea of the Fifth Amendment privilege against self-incrimination on the ground that the committee might conceivably have an undisclosed reason for asking the question which would incriminate the witness. Such a view would divide the committee from the witness as the hunters from the hunted, and seriously impair the effectiveness of *bona fide* legislative fact-gathering.

11. A related reason dictates the necessity for treating as definitive a subcommittee's communication to the witness of the nature of the matter under inquiry. In *Emspak* v. *United States*, 349 U. S. 190, and *Watkins* v. *United States, supra*, the petitioners contended that the resolution involved in those cases, that creating the House Un-American Activities Committee, was invalid because, when read together with the contempt statute, it provided no reasonably ascertainable standard of guilt and because it failed to meet the particularly stringent demands for precision made by the First Amendment upon legislation restricting the exercise of the basic freedoms.* The Government's reply to this contention, both in *Emspak* and *Watkins* was that

> "no problem of definiteness is presented so long as the subject of the specific, actual inquiry at which the witness is questioned has been disclosed. The clause of 2 U. S. C. 192 punishing refusal to answer any question 'pertinent to the question under inquiry' is not made unconstitutionally indefinite by the generality of the statute, resolution, or rule creating the committee. If we assume that the witness must have a basis for judging the pertinence of the 'question under inquiry' in order to determine whether he must answer, it does not follow that such information is obtainable only from the instrument creating the committee. * * * A witness who honestly had doubts could ask the committee before deciding whether to answer a particular question." **

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* We attack the subcommittee's resolution on similar grounds below.

** Government brief in *Watkins* v. *United States*, No. 261, October Term, 1956, p. 72. See to the same effect Government brief in *Emspak, supra*, No. 9, October Term, 1954 (No. 67, October Term, 1953), pp. 66-71, 78-95.

The resolution creating the subcommittee involved in this case is equally vague. See *infra*. Presumably here, too, the Government would argue that its vagueness is cured by the disclosure of the "subject of the specific, actual inquiry" on which the witness was questioned. In this case, a witness "who honestly had doubts" did ask the subcommittee what the question under inquiry was in order to have a basis for judging the pertinence of the question. Are we now to be told that the answer he received could be enlarged or disregarded at a subsequent prosecution for contempt? If this is so, then the announcement of the subject under inquiry does not cure the underlying vagueness of the resolution. It simply adds to its indefiniteness.

B. *The broad language of the resolution could not be substituted for the specific question under inquiry as a basis for pertinency.*

12. The considerations detailed in paragraphs 6 to 11 above do not merely involve principles of interpretation imposed by the Constitution upon a silent statute. The language both of the statute and the indictment reflects and reinforces these considerations. The statute does not punish refusals to answer any question that might conceivably fall within the general jurisdiction of the committee. The obligation which the statute imposes upon a witness before a congressional committee is to answer not those questions pertinent to an inquiry conceivably within the committee's general authority, but only those questions which are pertinent to the "question under inquiry," that is, the subject which the committee is actually exploring at the time of the witness' appearance. And the indictment charges petitioner with refusal to answer questions pertinent to the question "*then* under inquiry" (R. 2-3).*

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* See *Bowers* v. *United States*, *supra*, at 448, to the effect that the questions must be pertinent to "the subject matter of the inquiry then being conducted by the subcommittee."

13. Yet the trial court found that the questions were pertinent to an "inquiry into activities to overthrow the Government by force and violence" (R. 70; 139 F. Supp. at 859). But it was just as erroneous for the trial court thus to equate the "question then under inquiry" with the basic resolution defining the total jurisdiction of the subcommittee, as it was for the Court of Appeals to enlarge the subject actually under inquiry to make pertinent questions which the subcommittee itself thought were not pertinent to it.* Indeed, the trial judge not only failed to attach the appropriate legal consequences to the subcommittee's statement to the witness, but rewrote the statute as well.

C. *Pertinency could not be established at the trial by testimony concerning matters not disclosed to the witness at the hearing.*

14. Despite the fact that the basic resolution is inadequate to endow the questions involved here with pertinency

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* The respective positions of the trial court and the Court of Appeals in discussing pertinency, appear to be contradictory. The trial court rejected petitioner's claim that the committee was invading a judicial sphere in investigating the Matusow affair by pointing out that the "Matusow aspect of the investigation * * * was only one of the many subjects then under scrutiny and was not the sole topic in which the committee was interested." 139 F. Supp. at 860. The court went on to list as one of the "many subjects" of the investigation, the matter of Communist lawyers. But the Court of Appeals said that the committee was indeed investigating the Matusow affair, that in fact the questions which were asked of petitioner were pertinent to that investigation and that it was unnecessary to consider whether the subcommittee could enlarge or change its inquiry to focus upon the matter of lawyers which, after all, was only a "brief excursion" constituting no "abandonment" of the announced investigation into the Matusow affair. 240 F. 2d at 53. These inconsistencies are, of course, no accident. Both having disregarded the decisive significance of the committee's definition to petitioner of the question then under inquiry, each tribunal felt free to roam at large and to pluck out of the case any conceivable rationale to justify pertinency.

under the statute, the Government introduced at the trial a variety of matters which, it was claimed, showed that the witness had engaged in "subversive activity" (R. 70-72; 139 F. Supp. at 860). Obviously, the Government could not belatedly make a suspicion that petitioner was "subversive" the justification for calling him and asking him the *ad hoc* questions involved here, in the face of the explicit statement to the witness at the hearing concerning the reasons why he was asked these questions.

15. A trial of petitioner's past life and political associations was the Government's only alternative after it had disregarded the reasons for the interrogation communicated at the hearing. The "subversive activity" theory which was used to justify pertinency at the trial, suggests that the prosecution felt it necessary to begin all over again on a new theory because pertinency could not be justified upon the basis of the record of the hearing itself. This suspicion is fortified by the fact that the subcommittee did not, with a single exception (R. 25, 54-55), address any questions to petitioner at the hearing concerning the sundry matters which Mr. Sourwine testified were of interest to the subcommittee and constituted a reason for calling him. Most important, of course, is the fact that the trial judge not only admitted this evidence, but found pertinency on the basis of it.

16. We think the Court will agree that the contempt statute requires a more precise focus of criminality than the at-large recitals of subversion which constitute the Government's "proof" in this case. We believe that serious constitutional questions would arise if the application of a contempt statute depended upon matters of the kind adduced by the Government here. Many of them are stale and all of them involve the exercise of basic freedoms and could be of interest to a congressional committee only by drawing the most sinister and strained inferences from manifestly in-

nocent acts. But this is not a situation in which a committee has failed to define the subject under inquiry, or where the record of the hearing itself failed to establish it. Under such circumstances, as the Court of Appeals noted, the Government would be under a duty to establish the nature of the subject under inquiry through materials in the committee files. See, for example, *Bowers* v. *United States, supra.* And in doing so, it would be entitled to considerable latitude. Here, both the announced subject under inquiry and the subject which the subcommittee thought rendered the questions pertinent, were communicated to the witness. The Government's burden therefore could only be met by presentation of evidence establishing beyond a reasonable doubt either that the *ad hoc* questions fell within the announced subject under inquiry despite the committee's plain indication to the contrary, or that the substituted and independent subject of political qualifications for lawyers was properly under inquiry. But it did neither.*

17. Finally, the "subversive activity" theory, considered in a purely procedural posture, presents still another difficulty. Petitioner filed a motion for a bill of particulars in which he requested that the Government state the matter under inquiry and the manner in which the questions set out in the indictment were pertinent to the matter under inquiry (R. 4). The trial court denied this motion on the ground that the information sought by the bill could be ascertained from the printed record of the hearings (R. 79-80). To hold subsequently, as did the trial court, that petitioner could be held in contempt after the event not on the basis of the statement communicated to him but on the basis of some undisclosed subject in the mind of the subcommittee counsel, manifestly lacks essential fairness.

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* As we shall show below, the Government could not, as a matter of law, show such substitution.

D. The two members of the subcommittee present at the time of petitioner's appearance did not possess the authority to change the subject matter under inquiry.

18. While the Government "proved" many matters which were not properly issues in the case (see paragraph 14, *supra*), it failed to prove at all the one proposition which it was indispensably required to establish in order to make out a case. This is that the matter of the qualifications of lawyers was a proper subject under committee inquiry. We have considerable doubt as to whether a congressional committee has the power to legislate in the area of political qualifications for admission to the Federal bar. This seems to us to be a judicial function and to be, in any event, beyond the power of Congress, because of the limitations of the First Amendment. Moreover, even assuming for the sake of argument that Congress could investigate this area, we doubt whether it was or could be a question "then under inquiry" within the meaning of the indictment, since it was substituted for the matter under inquiry publicly announced at the commencement of the hearing.

19. Apart from these considerations, the subject of qualifications for practice in the Federal courts was not a matter under inquiry. Hence the conviction was obtained in violation of the statute, for, as we have seen, the questions were not pertinent to the committee's announced investigative purpose. Despite the fact that an answer to this problem was essential to the conviction, it has nowhere been dealt with. The opinion of the trial court, because it erroneously made the resolution the test of pertinence, did not deal with it. The Government ignored it below and the lower court itself found it unnecessary to reach it, affirming the conviction, as we have seen, on the basis of a theory of pertinency which not

only did not occur to the subcommitte, but was, in effect, disavowed by it.

But the court below could not abandon the only justification which the committee itself advanced for the question. As we have seen, acting at the direction of the temporary chairman, the committee counsel informed petitioner that the questions in issue were made pertinent by proposed legislation dealing with qualifications for practice in the Federal courts. But Senator Eastland had already authoritatively stated that the inquiry was limited to the Matusow recantation, adding that the subcommittee would not be "sidetracked" into other matters. Under the rules of the Senate and of the subcommittee, neither counsel nor the two subcommittee members present had authority to change the subject of the inquiry and to override the express statement of the chairman that the subcommittee would not be "sidetracked."

20. The subcommittee had nine members (R. 39). The two members present at the time of petitioner's appearance did not constitute a third of the full subcommittee, as required by Senate Resolution 180, *supra*, p. 6, for the transaction of business. Accordingly, these two members lacked the authority to alter the subject under inquiry, and to disregard the mandate of the full subcommittee regarding the limits of the inquiry as announced by the chairman at the outset of the hearings.

21. The authority given to these two members of the subcommittee to take sworn testimony as provided in the rules (R. 85) obviously did not include the authority to change the subject under inquiry. To permit a broad construction of the limited provision for exception to the general rule as to what constitutes a quorum would swallow up and negate the quorum rule entirely. It is a set-

tled principle that exceptions will be construed strictly, since otherwise the exception can nullify the general rule.*

22. Moreover, the legislative history of Resolution 180 shows that the exception for a testimonial quorum of less than one-third was adopted for a special, limited purpose which has no application under the present circumstances, and that it was not intended to apply beyond its precise and narrow terms.** The Senate report (Sen. Rep. 1208, 81st Cong., 2d Sess.), and the debate on this resolution, 96 Cong. Rec. 1284, demonstrate that the purpose of Resolution 180 was to meet the problem raised by the decision in *Christoffel* v. *United States*, 338 U. S. 84, and that the "resolution merely has to do with the procedure before committees *in order to cover the question of prejured testimony*" (96 Cong. Rec. 1284, emphasis supplied). The Senate report expressly stated that, except for this limited purpose, the amendment to the rules provided by the resolution "does not otherwise change the existing requirements pertaining to committee quoruma." Thus it is clear that this limited exception did not confer authority upon the two members of the subcommittee to alter the subject under inquiry or to embark upon a new and different investigation.

23. It would be as unsound legally as it would be intolerable politically to hold that individual committee members are free to roam through areas which a committee majority has deliberately excluded from investigation. Such a construction would violate the elementary rule that legis-

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* See Mr. Justice HOLMES' statement in *Schlemmer* v. *Buffalo, R. & P. R. Co.*, 205 U. S. 1, 10. See also *Piedmont & Northern Ry. Co.* v. *Interstate Commerce Commission*, 286 U. S. 299, 311-312; *United States* v. *Dickson*, 15 Pet. 141, 165; *United States* v. *Scharton*, 285 U. S. 518, 521-522.

** Obviously, section 2 of the enabling resolution which was adopted within the terms of the general Senate Rules must receive the same construction.

lative acts are presumed to have a purpose. But unless the definition of the "question under inquiry" is construed as a limitation on the authority of the individual members of the committee, it serves no purpose at all. Moreover, to deny such effect to the definition is to do violence to the democratic principle of majority rule. For such a denial would give a minority the power to defeat the will of the majority of the committee by pushing the inquiry into areas which the majority had decided to exclude. If indeed, "self-discipline and the voters must be the ultimate reliance for discouraging or correcting" abuses in this area,* then a congressional committee must be held to the principles which it itself adopts to insure political responsibility for its conduct.

24. The Court will recognize that no congressional committee would lightly undertake an investigation of the federal bar. Certainly a decision to initiate such an inquiry should not be imputed to the subcommittee in this case without a clear showing that it had, in fact, been authorized in a responsible and deliberate manner by a quorum of the full subcommittee. There is no showing in this case that such an inquiry was ever thus authorized. Moreover, this Court, in *Rumely's* case,** emphasized that courts must not impute to Congress an authorization to ask questions that infringe upon First Amendment or other constitutional rights unless Congress makes such authorization unmistakably clear.

II. The insufficiency of the indictment.***

25. The indictment (R. 2-3), alleges that petitioner had "unlawfully refused" to answer the questions put to him.

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* *Tenney* v. *Brandhove*, 341 U. S. 367.

** *United States* v. *Rumely*, 345 U. S. 41.

*** The issues raised in this and the succeeding points of the petition are common to a number of other cases arising under the contempt statute. These cases are collected in Appendix C.

It contains no allegation that these refusals were wilful or deliberate or intentional. Moreover, it contains nothing more than a reference to the legislative authority for the subcommittee's hearing and a naked allegation that certain questions put to petitioner were pertinent to an unspecified "question then under inquiry". The indictment is accordingly insufficient and should have been dismissed because it fails to allege and specify (a) that the "question then under inquiry" was within the scope of authority delegated to the committee by Congress and to the subcommittee by the committee; (b) the nature of the "question then under inquiry" to which questions put to petitioner are said to have been pertinent; and (c) that the refusal to answer was deliberate or intentional.

26. With the advent of Rule 7(c) of the Rules of Criminal Procedure in 1946, many of the technical rules relating to the form and content of indictments were rendered obsolete. *United States* v. *Debrow*, 346 U. S. 374. But under the new Rule an indictment must still be sufficiently specific to fulfill the basic purposes of the Sixth Amendment, which are (a) to enable the defendant to prepare his defense, (b) to ensure him against double jeopardy, and (c) "to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction." *

27. Indictments substantially identical to that involved here have been dismissed by the Court of Appeals for the Second Circuit for failure to specify the above three essential elements of the offense. *United States* v. *Lamont*,

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* *United States* v. *Cruikshank*, 92 U. S. 542, 558; *United States* v. *Lattimore*, 215 F. 2d 847 (App. D. C.); *Rolland* v. *United States*, 200 F. 2d 678 (C. A. 5); *Lowenburg* v. *United States*, 156 F. 2d 22 (C. A. 10).

236 F. 2d 312 (C. A. 2).* There is thus raised a conflict in the circuits with respect to an important question in the administration of Section 192, which apart from all other considerations warrants review here. Since the decision in *Lamont*, the Government has brought indictments under Section 192 in three cases in the Second Circuit. These indictments, involving the Committee on Un-American Activities, contain specific allegations with respect to the source of authority for the particular investigation, the nature of the matter under inquiry, and the fact that the defendant "deliberately and intentionally" refused to answer.**

A. *The failure to allege that the question under inquiry was within the subcommittee's delegated authority.*

28. The opening paragraph of the indictment lists four sources of authority for the hearing held by the subcommittee. Two of these, however, must be discarded as irrelevant. Section 102 (1) (k) of the Legislative Reorganization Act of 1946 (P.L. 601, c. 753, 60 Stat. 818) merely prescribes the number of members of the Senate

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* The Government has not sought review of the Court of Appeals decision affirming Judge WEINFELD's decision dismissing the indictments. 18 F.R.D. 27 (D. C. N. Y.).

** These cases are *United States* v. *Seeger*, No. C-152-240; *United States* v. *Yarus*, No. C-152-239, and *United States* v. *Sullivan*, No. C-152-238. See Appendix C. In its Opposition in *Barenblatt* v. *United States*, No. 742, this Term (Appendix C), the Government contended that *Lamont* must be confined to committees such as the Permanent Subcommittee on Investigations (pp. 15-16), and that it was inapplicable to a contempt case involving the narrower House Un-American Activities Committee Resolution. We submit that the Resolution here is broader than the House Committee Resolution and that Judge CLARK's distinction quoted by the Government has no application. In any event, the newly-brought indictments would seem to reflect an acceptance by the Government of the application of the *Lamont* ruling to resolutions of the kind involved here.

Committee on the Judiciary, and directs that all bills, resolutions, and other legislative matters relating to eighteen listed topics (e.g. "Judicial proceedings, civil and criminal, generally" and "civil liberties") shall be referred to the committee. Neither here nor in the Standing Rules of the Senate, wherein Rule XXV (k) simply duplicates Section 102 (1) (k),* is any authority delegated to the committee to conduct investigations, issue subpoenas, or exercise compulsory testimonial power.

29. There is, however, another provision of the Legislative Reorganization Act of 1946—Section 134(a), not mentioned in the indictment—which does authorize "each standing committee of the Senate, including any subcommittee" to conduct investigations, issue subpoenas, and require the attendance of witnesses and the production of documents. It is from this provision that the committee derives its compulsory testimonial authority, and it is Senate Resolutions 366 (81st Cong., 2d Sess.) and 58 (84th Cong., 1st Sess.), referred to in the indictment, and set out *supra*, p. 5,** which prescribe the scope of that authority.

30. It is within the meaning of this language that the authority for the inquiry must be found. Conceivably, the matter under inquiry before the subcommittee on April 19, 1955, might have been within the scope of that authority. But the indictment does not so allege. Nor does it allege any source of authority in the subcommittee to

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* The Standing Rules are reproduced in *Senate Manual*, S. Doc. 9 (84th Cong., 1st sess.), and Rule XXV(k) appears at pp. 37-38 thereof.

** For the legislative history, amendment, and adoption of these resolutions see 96 Cong. Rec. (81st Cong., 2d Sess.), pp. 15965, 16382, and 16872, and 101 Cong. Rec. (84th Cong., 1st Sess.), pp. 1707, 1835, 2569, and 3174-3175.

conduct any inquiry whatsoever. For these reasons, the indictment is fatally defective. On these very grounds, indictments that were identical in all relevant respects were dismissed in *United States* v. *Lamont, supra,* and *United States* v. *Metcalf,* unreported (Crim. No. 3052, S. D. Ohio W. D. 1955). In the *Lamont* case, Chief Judge CLARK wrote (at 315):

> "It is of course the function of an indictment to set forth without unnecessary embroidery the essential facts constituting the offense and thus accurately acquaint the defendant with the specific crime with which he is charged. But an allegation for lack of which the prosecution must evidently and as a matter of law fail cannot be regarded as superfluous. • • •
>
> "The deficiencies in the indictments now before us are thus quite fundamental and go far beyond the question whether defendants have been put on adequate notice. Rather the question is whether defendants are to be put on trial on an allegation which on its face charges no offense. • • •
>
> "There is no allegation in the indictments here linking the inquiry conducted by the subcommittee to the grant of authority dispensed to its parent committee."

31. This defect in the indictment could not be overcome by proof at the trial that the subcommittee was authorized to conduct the inquiry however its scope is defined. For the very purpose of an indictment is to inform the defendant of all essential elements of the charge in advance of the trial so that he can prepare his defense, and to inform the court of those elements, so that it can determine whether or not they are sufficient in law, and whether or not a trial is warranted. *United States* v. *Cruikshank, supra; Armour Packing Co.* v. *United States,* 209 U. S.

56, 83; *United States* v. *Krepper*, 159 F. 2d 958, 968 (C. A. 3), cert. denied 330 U. S. 824; *Fontana* v. *United States*, 262 Fed. 283 (C. A. 8). These purposes can be achieved only in the formulation of the indictment itself; any subsequent occasion is too late. Had the indictment alleged a source of authority for conducting an inquiry into the question of the political qualifications of lawyers, it would have been immediately apparent that there was no valid authorization for such an inquiry.

B. *The failure to specify the matter under inquiry to which the questions put to petitioner are said to be pertinent.*

32. Unless the questions which petitioner declined to answer were pertinent to a matter which the subcommittee, duly authorized, was inquiring into at the time, he has committed no offense. The indictment charges that the questions were "pertinent", but it does not state to what matter they were pertinent. The allegation that the questions put to petitioner were pertinent "to the question then under inquiry", without any description of the latter, is meaningless, and fails to satisfy the well-recognized requirement that an indictment under 2 U. S. C. 192 must plead pertinency as an essential element of the offense. *Sinclair* v. *United States, supra.*

33. We recognize that indictments are to be scrutinized for their genuinely informative qualities, and not for formal and technical defects. The lack of a formal allegation may not be fatal if its substance sufficiently appears from the facts alleged. *Hagner* v. *United States*, 285 U. S. 427; *Gariepy* v. *United States*, 189 F. 2d 459 (C. A. 6). The indictment against petitioner contains the formal charge that the questions were pertinent, but the presence or absence of the naked allegation is not the test. The indictment might be upheld without it, if the other allega-

tions adequately described the question under inquiry so that the facts bearing on pertinence sufficiently appeared. *United States* v. *Fields*, 6 F. R. D. 203 (D. C. D. C.) But the allegation alone, without the facts, is insufficient. *Rolland* v. *United States, supra; Sutton* v. *United States*, 157 F. 2d 661 (C. A. 5); *Lowenburg* v. *United States supra*. "We recognize the general rule that an indictment is insufficient if it states conclusions rather than the facts upon which the conclusions are based." *Butzman* v. *United States*, 205 F. 2d 343, 348 (C. A. 6), cert. denied 346 U. S. 828. Under that principle, petitioner's indictment is plainly insufficient.

34. When the statute under which the petitioner is indicted describes in specific terms all the elements of the offense, an indictment in the language of the statute may be sufficient without more. But when the statute is couched in general terms, as is the case here, mere repetition of statutory language is not enough; the indictment must allege the facts with particularity. *United States* v. *Carll*, 105 U. S. 611; *Frankfort Distilleries* v. *United States*, 144 F. 2d 824 (C. A. 10), rev'd on other grounds 324 U. S. 293.*

The statute under which petitioner's indictment is laid is "in generic terms" as it is intended for application to congressional investigations generally. Consequently, it is necessary that the indictment identify and describe with particularity the "question under inquiry" to which the questions put to the witness are deemed pertinent. *Sinclair* v. *United States, supra*. This, the indictment fails to do. Indeed, as the indictment stands, the "question then under inquiry" might have been the entire range of subjects committed for investigation to the subcommittee by Senate

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* As Judge RIFKIND has put it: "Where the definition of the crime is in generic terms, the charge must not be couched in the same terms but it must descend to particulars." *United States* v. *Waltham Watch Co.*, 47 F. Supp. 524 (D. C. N. Y.).

Resolutions 366 and 58. But the indictment does not so state. And it was for the grand jury and not the prosecutor to say so. Furthermore, the questions put to petitioner certainly were not—indeed it is hardly conceivable that any question could be—pertinent to all of the numerous and diverse matters set forth in the Senate resolutions.

35. Pleading, as Chief Judge CLARK remarked in the *Lamont* case (236 F. 2d at 317), is a "practical thing," and he went on to contrast the "over-elaboration" which in former times often defeated its purpose with the "formalism of generality" reflected in indictments such as those involved in that and the present cases. This indictment did not convey the information needed by the trial court to rule on pertinence and by the petitioner to prepare his defense. "The initial step in determining the pertinency of the question is to ascertain the subject matter of the inquiry then being conducted by the subcommittee." See *Bowers* v. *United States*, 202 F. 2d 447, 448 (App. D. C.). But the indictment did not enable petitioner or the court to take that first step.

36. In this case, the absence of a specification concerning the question under inquiry was seriously prejudicial. The trial judge treated the question under inquiry as though it were coextensive with clause three of the basic resolution. He stressed the matter of qualifications for lawyers but minimized the importance of the Matusow investigation in dealing with pertinency. He denied a bill of particulars as to the question under inquiry on the ground that it could be gleaned from the subcommittee's hearings (R. 79-80), then promptly proceeded to admit evidence of matters *de hors* the hearing, *supra*. The prosecution likewise urged that the question under inquiry was enveloped somewhere within the folds of the resolution and that the questions set forth in the indictment were obviously pertinent because similar questions had been held pertinent in other cases (R. 78-79).

37. Petitioner had a defense to what he conceived to be the charge. But in order to frame it and project it into the trial, it was imperative for him to know on what view of the purpose of the inquiry the indictment was based. Instead he was forced to proceed to trial and to cross-examine the Government's witness without the slightest clue what, within the broad sphere of the resolution and the jumble of unrelated subjects covered by the direct testimony, made the subcommittee's questioning pertinent. In short, in order to defend himself, petitioner had to decide whether the charge had something to do with the operation of the Internal Security Act (clause 1 of the resolution); espionage, sabotage and internal security (clause 2 of the resolution); or "subversive activities," not limited to sabotage, espionage and infiltration (clause 3 of the resolution), or all three clauses. Then he had to grope in the dark in order to comprehend what was relevant or important in the Government's testimony. Indeed, petitioner could not know until after his conviction and the trial court's opinion what the charge was. And the court below, as we have seen, *supra* (p. 34), wholly departed from the trial court's conception of the question under inquiry.

38. There is no conceivable reason why the court and parties should be obliged to guess at the "question then under inquiry" which, if unspecified, leaves the allegation of pertinency meaningless. In this respect, the indictment may be usefully contrasted with the recent indictments in the Second Circuit, *supra* (p. 42), and with those in such comparable cases as *United States* v. *Debrow*, 346 U. S. 374; *United States* v. *Lattimore*, 215 F. 2d 847 (App. D. C.); *United States* v. *Icardi*, 140 F. Supp. 383 (D. C. D. C.); and *United States* v. *Fields*, 6 F. R. D. 203 (D. C. D. C.).

In *United States* v. *Seeger* and companion cases, *supra*, the indictments state that pursuant to authorization the Committee on Un-American Activities "directed that an

investigation be conducted of Communist infiltration in the field of entertainment in New York." In the *Debrow* case, the defendant was indicted for giving a false answer to questions put to him at a hearing of a subcommittee of the Senate Committee on Expenditures in the Executive Departments. Just as "pertinency" is an essential element of the crime under 2 U. S. C. 192, so is "materiality" an essential element of the crime of perjury before a congressional committee and, as the Supreme Court has declared: "The question of pertinency * * * is not essentially different from the question as to the materiality of false testimony charged as perjury in prosecutions for that crime." See *Sinclair* v. *United States*, 279 U. S. 263, 298. The indictment in the *Debrow* case* unlike that in the present case, contained a very explicit allegation that the subcommittee "was conducting a study and investigation of whether applicants for appointments to offices and places under the Government of the United States had been and were being solicited and required by numerous persons within the State of Mississippi to make political contributions and donations as a condition precedent to receiving such appointments * * *." Thereafter, the questions put to the defendant were set forth in context, so that their materiality to the question under inquiry was supported by the facts set forth in the indictment, and not by a bare allegation, as in the present case.

39. The same specificity of allegation was present in the *Icardi* case, *supra*, where the charge that the questions put to the defendant were material was supported by a statement that the matter under inquiry by the special subcommittee was "* * * the circumstances surrounding the disappearance and death of Major William V. Holohan while a member of the armed forces of the United States

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* The indictment in the *Debrow* case is set forth in the opinion below, 203 F. 2d 699, at 702-703 (C. A. 5).

on assignment to the Office of Strategic Services in the Italian campaign of 1944." *

40. The *Fields* case, *supra*, is a good illustration of Chief Judge CLARK's observations, quoted above, about the practical aspects of pleadings. There the defendant was incited under 2 U. S. C. 192 for failing to produce documents in response to a subpoena issued by a special investigating committee of the House of Representatives. The indictment did not contain a formal allegation of pertinency, but it did contain a full description of the matter which the committee had under inquiry, so that the facts supporting the element of pertinency were set forth.**

41. There is surely no reason why the present indictment should not be held to similar standards of sufficiency. No problem peculiar to this particular subcommittee affords any justification for this looseness, as the *Lattimore* case, *supra*, demonstrates. For that case involved the same subcommittee and the same sources of its authority as does the present case. The indictment in the *Lattimore* case described the general scope of the subcommittee's function as set forth in the authorizing Senate resolution,

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* The indictment is on file in the district court, Criminal No. 821-55.

** Sustaining the sufficiency of the indictment, Judge HOLTZOFF pointed out (6 F.R.D. at 204):

> "It sets forth that the House of Representatives of the United States, by resolution identified in the indictment, created a committee to investigate the sale or other disposition of property which the United States had acquired in connection with the national defense. The indictment then enumerates certain specific items which the resolution directed the committee to investigate. The indictment further alleges that the defendant was summoned to produce certain documents concerning one of the items which it appears from the indictment the committee was authorized to investigate."

and then carefully specified the question under inquiry at the time of the defendant's appearance.*

By a closely-divided vote, the Court of Appeals held that two of the questions put to Lattimore, were not immaterial "from the face of the indictment."** This circumstance

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* It stated (215 F. 2d at 856-857):

"2. That at the time and place aforesaid, the said Senate Subcommittee, inquiring as aforesaid, was conducting a study and investigation of the administration, operation, and enforcement of laws, relating to espionage, sabotage, and the protection of the internal security of the United States, and of the extent, nature, and effects of subversive activities in the United States; including but not limited to the extent to which the Institute of Pacific Relations was infiltrated and influenced or controlled by agents of the Communist world movement; the extent to which these agents and their sympathizers worked through the Institute into the United States Government to the point where they exerted influence on the United States Far Eastern policy, and the extent to which they still exert such influence; and the extent to which such agents and their sympathizers misled American public opinion, particularly with regard to Far Eastern policy.

"3. That it was material to the study and investigation to ascertain the extent to which the Institute of Pacific Relations had been infiltrated and influenced by agents of the Communist world movement and their sympathizers and the extent to which any of these persons had exerted influence on United States Far Eastern policy from posts they secured in the United States Government, or had influenced American public opinion with reference to said policy; and what participation in or knowledge of any such situation described above was had by Owen Lattimore, who had been an important figure in the Institute of Pacific Relations, and editor of one of its official publications, 'Pacific Affairs', and who had been an official of the United States Government; and it was further material to ascertain whether Lattimore himself had been a promoter of Communism or Communist interests."

** 215 F. 2d at 853. Four of the nine judges dissented on the ground that all of the questions put to Lattimore were immaterial on the face of the indictment.

strongly suggests that the Government has resorted to a vague and loosely drawn accusation in the present case because a properly-drawn indictment would at once disclose that the questions put to petitioner were not pertinent to the matter then under inquiry.*

C. The failure to allege that petitioner acted wilfully.

42. In the *Lamont* case, District Judge WEINFELD held (18 F. R. D. 27) that the indictments involved there were fatally defective for failure to allege that the refusals were "deliberate" or wilful. The decisions of this Court, upon which Judge WEINFELD relied, in *Quinn*, 349 U. S. 155, and in *Bart*, 349 U. S. 219, seem to us to dispose of this matter. In *Quinn* the Court held (at 165) that, "Section 192, like the ordinary federal criminal statute, requires a criminal intent—in this instance, a deliberate, intentional refusal to answer." The Court further ruled that, "This element of the offense, like any other, must be proved beyond a reasonable doubt."

If a deliberate, intentional refusal is an element of the offense which must be proven, it must also be alleged in

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* In *United States* v. *Kamin*, 135 F. Supp. 382 and 136 F. Supp. 791 (D. C. Mass.), District Judge ALDRICH denied a motion to dismiss a comparable indictment. The case went to trial, and Judge ALDRICH dismissed some of the counts at the conclusion of the Government's case and directed a verdict of acquittal at the end of the trial, basing his rulings on the lack of pertinent relation between the questions put to the defendant at the subcommittee's hearing, and the matters into which the subcommittee was authorized to inquire. These defects would have been plainly disclosed by a properly-drawn indictment and "an unnecessary trial might have been averted had it been made clear in advance thereof that there was lacking an essential element of the crime charged, namely, that the inquiry was within the subcommittee's authority." *United States* v. *Lamont*, *supra*, at 315.

the indictment. *United States* v. *Hess*, 124 U. S. 483. Nor can it be claimed that the requirement of wilfulness is a formal or technical one. Compare *Morisette* v. *United States*, 342 U. S. 246.*

All of our contentions regarding the defects in the indictment—and in particular the instant contention—frame a conflict, to which we will return at the conclusion of the petition, between two theories with respect to the contempt statute. We insist that this is, after all, an "ordinary federal criminal statute" which must be applied in the light of the well-understood canons of the criminal law. But the application of the statute in this case can only be defended on the theory, denounced long ago by Jefferson in a discussion of congressional contempt powers, that "the offense is to be undefined, and to be declared only *ex re nata*, according to the passions of the moment * * *."**

III. The contempt statute cannot be applied in disregard of constitutional protections against compulsory disclosures of political affiliation.

43. Even if there were an arguable relationship between the questions put to petitioner and a matter properly under inquiry, that alone would not establish the subcommittee's right to require him to answer. As we have

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* The necessity for an allegation of a deliberate or intentional refusal is related to the requirement that the indictment set forth the nature of the matter under inquiry. As Judge BAZELON observed in his concurrence in *Bowers* v. *United States*, *supra* (at 453),

> "conclusive presumption of intent to violate the statute *might* attach to a naked refusal to answer * * * no such presumption would attach to a refusal to answer a question not shown to be 'pertinent to the question under inquiry.'"

** *Jefferson's Manual* (Sen. Ed. 1892) 194.

already indicated, there are strong considerations flowing from the principle of the separation of powers and the right to counsel which put the subject matter of political qualifications for lawyers beyond the reach of the investigative power. And if the questions were validly germane to the Matusow matter, a crucial issue in any event would be whether the Bill of Rights protected petitioner against the compulsion of answering questions dealing with his political views and affiliations.

44. The trial court thought (139 F. Supp. at 861) that, "freedom to hold any political views or any religious views does not include the right to refuse to state what those views are." The court below proceeded upon the assumption (240 F. 2d at 52) that if an evil under investigation is sufficiently grave, disclosures in the area of the First Amendment could be exacted. But this was not the issue. The proper test is whether the questions put to petitioner were, in the context of the hearing, sufficiently connected with the inquiry to justify the infringement of petitioner's First Amendment rights.

45. A defendant who violated a sedition* or obscenity** statute could not be convicted if the restraints failed to meet constitutional standards. Our complaint here is not that a particular test, such as clear and present danger, was not applied. Rather it is that here, as in other aspects of the application of the statute, the lower courts treated contempt of Congress as a unique offense, impermeable to constitutional pressures. The lower courts simply did not undertake to probe the constitutional issues, of which they must be the anxious guardians, with an awareness of what was at stake. There was entirely lack-

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* *Dennis v. United States*, 341 U. S. 494.

** Compare *Butler* v. *Michigan*, 77 S. Ct. 524.

ing that attitude of mind which is indispensable when judgment is brought to bear on the conflict between the claim of freedom and other claims.

Here is a case in which an invasion of free speech was accompanied by an attempted usurpation of judicial power and an attack upon the right to counsel. Opposed to this is the fact that, at best, the disclosures involved had a most tenuous bearing on the subject under investigation as it was announced by Senator Eastland. But the lower courts simply failed to analyze the problem in the terms which this Court has prescribed for the resolution of problems of this kind. Petitioner's rights were not merely violated; they were ignored.

46. The reasons which resulted in the grant of the writ of certiorari on this issue in *Watkins, supra*, and in *Sweezy* v. *New Hampshire*, No. 175, this Term, are applicable here. Indeed, they are even more applicable because of the additional injuries to important public interests which the interrogation caused. It seems to us that this case presents in a uniquely pressing way the issue, which has not been but should be decided by this Court, whether modes of adjudication prescribed for constitutional cases may be abandoned in statutory contempt cases involving an inquiry into subversion.

IV. The resolution establishing the subcommittee is unconstitutional.

47. The resolution establishing the subcommittee granted it jurisdiction to investigate a number of separate matters. These were (1) the administration, operation and enforcement of the Internal Security Act of 1950, (2) the administration, operation and enforcement of other laws relating to espionage, sabotage, and the protection of the internal security of the United States, and (3) the extent, nature and effects of "subversive activities" in the United

States. The investigation conducted by the subcommittee in the present case obviously had no relation to the administration, operation and enforcement of either the Internal Security Act of 1950 or any other law. Accordingly, the source of the subcommittee's jurisdiction must be found in the final catch-all clause of the resolution "The extent, nature and effects of subversive activities in the United States."

48. This portion of the resolution is hopelessly vague. The resolution itself states that the phrase "subversive activities" includes, but is not limited to, "espionage, sabotage, and infiltration." The investigation here under review did not in any manner deal with either espionage, or sabotage, which concededly would be meaningful terms. The term "infiltration" is not defined and by itself adds nothing to the phrase "subversive activities."

49. The phrase "subversive activities," however, fails to furnish any guide to the committee's jurisdiction. The word "subversive" refers to the "overturning" of something. The resolution, however, supplies no predicate, and hence no guide is furnished as to what is being overturned. By itself, the word is a meaningless term of abuse usually applied to activities "helpful or benevolent to wage earners, persons on relief, or those who are disadvantaged in the struggle for existence." * Thus the portion of the resolution which is involved here is left without meaningful boundaries. Since 2 U. S. C. 192 only punishes the withholding of pertinent testimony, *Sinclair* v. *United States, supra,* there must be some standard to determine what is and what is not pertinent to the scope of the subcommittee's inquiry. The absence of definable boundaries to the scope of the subcommittee's jurisdiction

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* See Emerson and Helfeld, *Loyalty Among Government Employees,* 58 Yale L. J. 1, 39, 40 (quoting the late Mr. Justice JACKSON).

renders the resolution unenforceable by means of the contempt statute.*

50. In addition, the absence of definable boundaries to the subcommittee's jurisdiction brings its subpoena powers into conflict with the Fourth Amendment.** The subcommittee's authority and its conduct in this case, as justified by the vague testimony of its counsel, fall squarely within the condemnation voiced in *In re Pacific Ry. Commission*, 32 Fed. at 263, which was quoted with approval in *Jones* v. *Securities and Exchange Commission*, 298 U. S. at 27:

> "A general, roving, offensive, inquisitorial, compulsory investigation, conducted by a commission without any allegations, upon no fixed principles, and governed by no rules of law, or of evidence, and no restrictions except its own will, or caprice, is unknown to our constitution and laws; and such an inquisition would be destructive of the rights of the citizen, and an intolerable tyranny. Let the power once be established, and there is no knowing where the practice under it would end."

51. The court below relied on its decision in *Barsky* v. *United States*, 167 F. 2d 241, cert. denied 334 U. S. 843, which ruled that the resolution creating the House Com-

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* Compare *M. Kraus & Bros.* v. *United States*, 327 U. S. 614, and *O'Connor* v. *United States*, 240 F. 2d 404 (App. D. C.).

** *Jones* v. *Securities and Exchange Commission*, 298 U. S. 1; *In re Pacific Ry. Commission*, 32 Fed. 241; cf. *Ellis* v. *Interstate Commerce Commission*, 237 U. S. 434; *Kilbourn* v. *Thompson*, 103 U. S. 168, 196; *Federal Trade Commission* v. *American Tobacco Co.*, 264 U. S. 298, 305-307. "An investigation not based on specified grounds is quite as objectionable as a search warrant not based upon specific statements of fact. Such an investigation, or such a search, is unlawful in its inception and cannot be made lawful by what it may bring, or by what it actually succeeds in bringing to light." *Jones* v. *Securities and Exchange Commission*, *supra*, at 27.

mittee on Un-American Activities was free from vagueness. But the vagueness in that resolution was found to be cured by language not present in the instant resolution. 167 F. 2d at 247-248. The decision of the court below that the House resolution creating the Committee on Un-American Activities is free of vagueness, is now under review by the Court in *Watkins, supra*. The considerations which led to review there are even more applicable here for the resolution involved here is more indefinite.

V. The denial of petitioner's right to a fair and impartial grand jury.

52. In the trial court, petitioner unsuccessfully moved for a hearing in order to determine the qualifications of the grand jurors which returned the indictment. The motion represented that eleven members of the indicting grand jury were employees of the United States Governmnt and two were housewives who might be wives of Government employees. A hearing was sought to determine whether the votes of Government employees or wives of Government employees were necessary to return the indictment and to establish the bias of these individuals (R. 4-9). The motion was accompanied by an offer of proof of a climate of opinion among Government employees that they would jeopardize their tenure or provoke investigation by failing to indict petitioner at the Government's request.*

53. Despite the fact that petitioner was unable to show that more than twelve grand jurors were Government employees, we submit a hearing should have been granted and that review is warranted here for the same reasons advanced to the Court in *Watkins, supra*.

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* Compare *Dennis* v. *United States*, 339 U. S. 162.

CONCLUSION

The paradox of prosecution without the protection of the criminal law.

The decision of the court below conflicts with the applicable decisions of this Court and raises important questions of Federal law requiring review by this Court. The reasons stated above, as well as the Court's responsibility for the protection of the integrity of the grand jury system, require that this petition for writ of certiorari be granted.

Moreover, the problems presented by this case, considered together, fall into a pattern which emphasizes the necessity for review here. This pattern consists, on the one hand, of the conversion of the investigative power into an instrumentality of law enforcement and, on the other, of the denial of the protection of the criminal law in the administration of the contempt statute. As we have seen, it excludes the demands of the First Amendment. It is essentially an assertion of legislative absolutism.

This pattern, which is widely prevalent (Appendix C), finds sharp expression in this case. A lawyer who has practiced for over thirty years is faced with a six-month jail sentence for refusal to make disclosures which were manifestly exacted solely for the purpose of doing him injury. And that punishment flows from the fact that petitioner participated professionally in unpopular cases, including one, then *sub judice*, in which a Government informer was subsequently adjudged to have perjured himself. Thus, the investigative power was employed here in derogation both of the judicial power and of the freedoom of advocacy. Sanction for this exercise of the power can only serve to warn lawyers whose professional services are sought for unpopular clients, that a

congressional subpoena must be added to all of the other hazards involved in such representation.

When the case came to court, the second part of the pattern emerged, for contempt sanctions were applied in disregard of the fact that while Section 192 gave powers to Congress, it also gave important rights to the witness and responsibilities to the courts. The theory upon which the conviction and its affirmance must rest is that a congressional committee is a species of grand jury which does not have to justify to the witness the pertinency of its interrogation.* The rights which a defendant traditionally enjoys in a criminal trial were ignored. A trial was conducted in which such concepts as burden of proof, presumption of innocence and reasonable doubt** were neither referred to nor employed as guides in the adjudication of innocence or guilt. It is imperative that this statute be

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* See *Blair* v. *United States*, 250 U. S. 273, 282.

** This Court long ago in *McGrain* v. *Daugherty*, 273 U. S. 135, rebuked the contention that the contempt statute was somehow exempt from the traditional protections of the criminal law and insisted that these protections apply to the witness even at the hearing stage of a legislative inquiry because the "presumption of innocence is at least as great as the presumption of regularity." The reemergence of these same notions that criminal protections may be disregarded in a case of this sort is seen perhaps most sharply in the lower court's decision. Certainly, a court applying the standards of reasonable doubt and presumption of innocence could not conceivably have concluded on this record that the witness ought to have known that the committee demanded his answers because they were pertinent to the announced subject matter of the Matusow recantation.

rescued from the uncertainty and confusion which dominate its administration, and subjected to the discipline of the criminal law.

Respectfully submitted,

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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

OCTOBER TERM, 1956

Criminal 1261-55

FILED JAN. 3, 1957

Joseph W. Stewart, Clerk

No. 13,302

HARRY SACHER,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court
for the District of Columbia

Before:

WASHINGTON, BASTIAN AND BURGER,
Circuit Judges.

Judgment

This cause came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, It is ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

Dated January 3, 1957.

Per Circuit Judge BURGER

Appendix B

No. 13,302

HARRY SACHER,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

United States Court of Appeals
District of Columbia Circuit

Before:

WASHINGTON, BASTIAN AND BURGER,
Circuit Judges.

BURGER, Circuit Judge.

Appellant, Sacher, was subpoenaed and appeared as a witness before the Subcommittee on Internal Security of the Senate Judiciary Committee where he refused to answer questions as to past or present membership in the Communist Party. He was cited for contempt and thereafter indicted on three counts under Title 2 U. S. C. A. §192,[1] found guilty on all three counts and sentenced to six months' imprisonment and a fine of $1000. He appeals from a conviction after trial in the district court, having waived a jury trial.

The indictment charges that on April 19, 1955 Sacher appeared before the Subcommittee at a hearing in Washington, D. C., was asked and refused to answer three ques-

[1] Rev. Stat. §102 (1875), as amended, 52 Stat. 942 (1938), 2 U. S. C. A. §192.

tions, each of which is the subject of a separate count of the indictment:

1. Are you, Mr. Sacher, a member of the Communist Party, U. S. A.?

2. Have you ever been a member of the Communist Party of the United States?

3. Are you now or have you ever been a member of the Lawyers' Section of the Communist Party, U. S. A.?

Appellant challenges his conviction on various grounds: (1) He asserts that the statute punishes only a refusal to answer questions pertinent to the inquiry and argues that his possible membership in the Communist Party was not pertinent. (2) That even if pertinent, the remoteness of the information sought to the subject under inquiry infringes First Amendment rights. (3) Appellant urges that the testimony as to the Subcommittee's information on appellant's background was not admissible in the district court. (4) He claims the Subcommittee changed the subject of inquiry when he testified and that the two members present did not have the power to do so. (5) Appellant attacks the indictment as faulty because it does not charge his refusal to answer was "willful or deliberate or intentional." (6) He argues the source of the Subcommittee's jurisdiction rests upon a resolution of the parent committee which is "hopelessly vague, and leaves the resolution without meaningful boundaries." Appellant urges the "absence of [such] boundaries brings the Subcommittee's subpoena power in conflict with the Fourth Amendment."

(1)

To determine whether or not the questions set forth in the indictment were pertinent to the subject of the Sub-

committee's inquiry, we look to the history of the inquiry as disclosed by the record. In 1950 the Senate adopted a resolution[2] which empowered the Committee on the Judiciary, or any authorized subcommittee, to study and investigate subversive activities in terms as follows:

> "*Resolved*, That the Committee on the Judiciary, or any duly authorized subcommittee thereof, is authorized and directed to make a complete and continuing study and investigation of (1) the administration, operation, and enforcement of the Internal Security Act of 1950 [50 U. S. C. A. §781 et seq.]; (2) the administration, operation, and enforcement of other laws relating to espionage, sabotage, and the protection of the internal security of the United States; and (3) the extent, nature, and effects of subversive activities in the United States, its Territories and possessions, including, but not limited to, espionage, sabotage, and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world Communist movement or any other movement seeking to overthrow the Government of the United States by force and violence."

By resolution a quorum of the Subcommittee, for purposes of taking sworn testimony, consisted of not less than two members and the presence of a quorum at the hearings described in the indictment is not in dispute. Early in 1955 the Subcommittee commenced a series of hearings described in the Committee Report as "Strategy and Tactics of World Communism (Significance of the Matusow Case)." Harvey Matusow had appeared before the Subcommittee on four occasions in 1952 as a professed former Communist giving evidence "to expose the Com-

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[2] Sen. Res. 366, 81st Cong., 2d Sess. (1950).

munist conspiracy." At the outset of the hearings here involved, the Chairman of the Subcommittee took note of the fact that Matusow had currently characterized his previous testimony before the Subcommittee as false. A public announcement had been made that Matusow's book was soon to be published on the subject of the recantation of his "false testimony."

It was against this background that the Chairman, in opening the hearings in February, 1955, recited the prior appearances of Matusow and asserted:

> "• • • The purpose of the hearing now commencing is to inquire into this whole matter.
>
> "• • •
>
> "As a result of testimony taken in this hearing, it may appear that Mr. Matusow told the truth in his original testimony before us and is now lying when he says that his original testimony was not the truth. It may appear that part of what he told us was true and part was untrue. It may appear that he never tells the truth by intent. It may appear that his recent conduct is designed simply to call attention to a book which is soon to be published under his signature, and that his motive for this shabby performance is merely low personal greed. It may appear that he has been the victim of pressure brought by Communists, as well as those who have a vested interest in concealing the Communist conspiracy, and he has finally broken under this pressure. Or there may be still another explanation.
>
> "• • •
>
> "The subcommittee in this series of hearings hopes to determine what is the truth. The subcommittee may be able to show, in some instances, what are lies. The subcommittee probably can and will try to make a record as to just what Mr. Matusow now says the

truth is. The subcommittee also will seek to determine, from the testimony of this witness and others, all the facts surrounding this case, and to make as complete a record of those facts as possible."

The record discloses that prior to appellant's appearance before the Subcommittee it had "information respecting Mr. Sacher's connections with Communist and Communist front organizations going back over a period of a number of years, going back to at least as early as 1937." The Subcommittee had information that Sacher had been "connected with the International Labor Defense which was identified by Attorney General Biddle as the legal arm of the Communist Party." Testimony before Executive Sessions of the Senate Subcommittee identified Sacher as present at meetings attended only by high functionaries of the Communist Party; that he was a member of the American League for Peace and Democracy in 1939-40, which group was cited by the Attorney General as a subversive organization; that he was a trustee of the Jefferson School of Social Science, identified by the Subcommittee as "Communist controlled," and that he had a part in various other organized activities characterized by the Committee as subversive, as well as personal relationships with known Communists. This testimony of Subcommittee legal counsel was received only on the issue of pertinency.

In addition, the record discloses the Subcommittee had information to the effect that the International Union of Mine, Mill and Smelter Workers (described in the Subcommittee's Report as "Communist controlled") gave cash to Cameron and Kahn, publishers, to finance the printing and publication of Matusow's book on recantation, that this publication was part of a concerted attack designed to discredit "anti-communist" witnesses and pro-

fessed "former Communists," and that this entire scheme was the product of Communist lawyers. There was further information that appellant Sacher was one of the lawyers within the Communist Party who had formulated this plan, and that he probably was one of the two leaders. The accuracy of the Subcommittee's information on any of these subjects was not in issue; and the district court admitted this testimony only for the limited purpose of showing the pertinency of the Senate Subcommittee's line of inquiry.[3]

Thus, when the Subcommittee called appellant as a witness, it had information as to the following: (a) reports linking appellant with the Communist Party; (b) reports linking the Communist Party with a conspiracy to bring about a recantation by Matusow of his testimony against the Communist Party and members thereof; and (c) reports linking appellant with this alleged conspiracy.

Preliminary questions answered by Sacher established the following background: Sacher met Matusow two days before Matusow took the stand as a witness in support of a motion for a new trial for a Sacher client (Elizabeth Gur-

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[3] "The Court: I am going to overrule the objection. I am going to state again that the objection would be well founded and the Court would sustain it if this testimony was given for the purpose of proving the facts contained in the witness' answer. We have to distinguish in our thinking between that and merely proving the relevancy of the questions addressed to the witness which are enumerated in the indictment.

"The Court is admitting this testimony merely to show the relevancy of these questions. Now, that relevancy may be established by showing that the committee had certain hearsay information which it wanted to investigate. That is entirely proper, just as I have indicated a little while ago that reasonable ground for issuing a warrant may be established by hearsay information." Transcript of Record, pp. 47-8.

ley Flynn) who had been convicted under the Smith Act; appellant had appeared as counsel for "leaders of the Communist Party, U.S.A." in a lengthy trial before District Judge MEDINA. Sacher had seen Matusow on the days when the motions for new trial for Sacher's client and others were heard before District Judge DIMOCK in New York; Matusow had given Sacher a 75 page report dated October 19, 1951, which Matusow had also given to the Federal Bureau of Investigation and the House Committee on Un-American Activities and perhaps others. In addition, Matusow had also given Sacher a diary "the first sheet of which was dated * * * sometime in 1948" and other sheets dated sometime in 1950, 1951 and 1952. Other sheets bearing notes of Matusow's testimony before the Subversive Activities Control Board were also received by Sacher from Matusow. Sacher testified he had conversations with Nathan Witt, counsel for Clinton Jencks, at about the time of the arguments before Judge DIMOCK. Both lawyers had a natural common cause in the efforts to secure a new trial for their respective clients; it is not doubted or challenged that as lawyers they had a right and a duty to make use of a possible *bona fide* recantation of Matusow's testimony by legitimate means.

It is appellant's contention that the questions forming the basis of the indictment could not be pertinent to the subject of inquiry for appellant's testimony demonstrated he had no knowledge of the circumstances leading to the recantation. If this were true an interested party could effectively determine the pertinency of questions and the inquiring body would abdicate in favor of the witnesses. Pertinency is not measured by the amount of information a witness may wish to disclose. The test is whether under the circumstances the information reasonably sought is germane to the subject of inquiry.[4] If it

[4] See United States v. Orman, 3 Cir., 1953, 207 F. 2d 148.

is proper, as appellant concedes, to investigate whether there existed "a general conspiracy to discredit government informers in the field of Communism," it was pertinent to question appellant as to his membership and participation in the group believed to have formed the conspiracy. That the Subcommittee's background information suggested the possible existence of such a conspiracy and plan, cannot be doubted. Against this background the three questions put to Sacher were plainly pertinent to an inquiry seeking "all the facts surrounding this [Matusow recantation] case."

Perhaps it would not be inappropriate to comment in passing on two other aspects of Sacher's protests to the questions put to him at the hearings. Sacher repeatedly placed his refusal to answer questions as to membership on high grounds of moral and political freedom. His refusal to answer the questions covered by the indictment brought on the following colloquy:

> "[Senator McClellan.] Well, the Chair does not think that it is beneath the dignity of a good citizen of the United States to answer a question as to whether he is a member of an organization that seeks the overthrow of this Government by force and violence and therefore, the Chair propounds to you now the question, Are you now a member of the Communist Party of the United States?
>
> "[Mr. Sacher.] Mr. Chairman, medieval inquisitors also thought there was no impropriety in asking those whom they regarded as heretics to answer the question.
>
> "[Senator McClellan.] The Chair does not care for a lecture. The Chair asked you a question.
>
> "[Mr. Sacher.] And I decline to answer that question, Mr. Chairman.

"[Senator McClellan.] The Chair orders you to answer the question.

"[Mr. Sacher.] I decline to answer that question on the grounds I have already stated.

"[Senator McClellan.] The Chair asks you another question. Have you ever been a member of the Communist Party of the United States?

"[Mr. Sacher.] I respectfully submit, Mr. Chairman, that my conscience dictates to me that I shall not, under your compulsion or anybody else's compulsion, make any disclosure of any of my beliefs, political, religious, economic, or social, past or present, and I decline to answer your question.

"[Senator McClellan.] The Chair orders you to answer the question.

"[Mr. Sacher.] I respectfully decline to answer it.

"[Senator McClellan.] The Chair asks you another question. Have you ever been a member of any organization, Communist Party or by any other name, that advocates and seeks the overthrow of the Government of the United States by force and violence?

"[Mr. Sacher.] I will say to the Chair that I have never been a member of any organization which I *believed* to be a teacher or advocate of the forceable or violent overthrow of the Government of the United States." (Emphasis added.)

Thus Sacher showed that he was willing to testify about associations with political groups upon the basis of *his* beliefs as to the objectives of those groups. This is hardly consistent with his protests that to answer "is incompatible with the dignity of the individual to make compulsory disclosure of his thoughts and his ideas and his beliefs." The injection of the element of *his* belief into the answer afforded him a shield in the form of a purely subjective test as to the aims of the groups he described.

This willingness to testify about political associations in the colors of his own beliefs tends to cast doubt on the genuineness of his protests. This is not to say, of course, that the validity of an objection to the question depends upon the sincerity or motives which underlie the objection.

Secondly appellant argued at the hearing that the questions directed to him constituted an effort to "call an attorney to account" for his professional activities in representing a client. The record here presents no such issue. The record discloses that the Chairman pursued the inquiry fairly and judiciously often in the face of an attitude on the part of the witness which might well have provoked a less judicious and temperate presiding officer.

(2)

If the questions be deemed pertinent, appellant next contends there was absent a substantial "public interest" to justify an infringement of his right under the First Amendment. It is difficult to imagine a clearer "overriding public interest" than an inquiry into an alleged conspiracy to discredit the congressional and judicial processes by suborning witnesses and by procuring recantations of testimony upon which Congress and the courts have theretofore relied. The Chairman's opening statement, *supra*, 240 F. 2d 49, made clear that one product of the inquiry might well be that Matusow had in fact testified falsely and that would be of concern to both Congress and the courts. On the other hand if a conspiracy existed to procure false recantations and thus cast doubt on the judicial process broadly as well as upon specific convictions, the legislative and judicial branches would be equally concerned.

(3)

Third, it is urged that the testimony of the Subcommittee's legal counsel was inadmissible in the district

court. As the district court repeatedly observed, this testimony was admitted for the sole purpose of establishing the pertinency of the questions.[5] Considerable latitude must be allowed to establish the background and basis for a given line of congressional inquiry. This court, in *Watkins* v. *United States*,[6] said "Congress has before it the important duty to legislate effectively, but at the same time wisely, upon the problems posed by the world communist movement. It cannot perform that duty without information. It ought not try to perform it without information." Furthermore, in a contempt proceeding, when the questions asked may not be pertinent on their face to the inquiry, it is the Government's duty to establish by other evidence this relationship.[7]

(4)

It is also argued that the Subcommittee changed and enlarged the scope of the inquiry and appellant points to questions which the Subcommittee counsel sought to justify in the hearing by reference to possible legislation to fix additional standards for admission to practice in federal courts, e. g., to bar Communist Party members. We do not need to reach the question of whether the Subcommittee could enlarge the scope of the inquiry nor do we reach the propriety of a line of inquiry concerning practice of law by Communists. Assuming, *arguendo*, that the subject of practice of law by a Communist Party member was beyond the power and authority of the Subcommittee, the absence of authority to inquire into that

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[5] See note 3 supra.

[6] 98 U. S. App. D. C. 190, 233 F. 2d 681, 687, certiorari granted, 1956, 352 U. S. 822, 77 S. Ct. 62.

[7] Bowers v. United States, 1953, 92 U. S. App. D. C. 79, 202 F. 2d 447.

area cannot affect the inquiries properly made and pertinent to other authorized subjects being actively pursued by the Subcommittee. Early in the hearing the Subcommittee Chairman notified Sacher that the "primary purpose of this testimony is to establish a relationship or contact you have had with Mr. Matusow * * *" Thus, the question whether Sacher's activities in relation to Matusow and his recantation were purely professional or whether they were motivated by Sacher's involvement in a suspected Communist conspiracy was pertinent to the plainly announced subject of inquiry. There was no abandonment of the "Matusow Case" inquiry by reason of the brief excursion into discussion of possible legislation relating to law practice.

Moreover, the witness showed his awareness of the risk involved when he refused to answer the questions concerning membership in the Communist Party,[8] saying, "an inquiry to me concerning this matter [of membership] is not pertinent to *anything* with which this committee is concerned, and is not relevant to *any inquiry* that may properly be made of me." (Emphasis added.)

(5)

Appellant's contention that an indictment under 2 U.S.C.A. §192 must affirmatively charge a "wilful or deliberate or intentional" refusal to answer the question is disposed of by this court's recent decision in *Deutch* v. *United States*, 98 U. S. App. D. C. 356, 235 F. 2d 853 (1956), in which we held that a *refusal* to answer is a willful act per se.

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[8] See Quinn v. United States, 1955, 349 U. S. 155, 75 S. Ct. 668, 99 L. Ed. 964.

(6)

Appellant's final argument that the Subcommittee's jurisdiction rests on a resolution of the parent committee which is "hopelessly vague, and leaves the resolution without meaningful boundaries," the absence of which brings its subpoena power in conflict with the Fourth Amendment, is without merit. *Barsky* v. *United States*, 83 U. S. App. D. C. 127, 167 F. 2d 241, certiorari denied, 1948, 334 U. S. 843, 68 S. Ct. 1511, 92 L. Ed. 1767.

The judgment below is

Affirmed.

Appendix C

Pending Cases Arising Under the Contempt Statute Which Present Issues Similar to Some of the Issues in this Case

In the following cases, witnesses before either the House Un-American Activities Committee or the Senate Internal Security Subcommittee were indicted after declining to answer questions on the ground of the First Amendment. In addition to this issue, presented by Question 6(c) of the instant petition, there are other common issues which are designated by the numbers of the questions presented in this petition.

1. *District of Columbia Cases*

Watkins v. *United States*, No. 261, this Term—6(a), (b), (d); 8;
Barenblatt v. *United States*, No. 742, this Term—6; 7(a), 7(c);
Flaxer v. *United States*, No. 462, this Term—3; 6(a), (b);
Gojack v. *United States* (App. D. C. No. 13,464)—6(a), (b); 7(a), (b), (c); 8;
Watson v. *United States* (App. D. C. No. 13,656)—6(a), (b); 7(a);
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425315—57——1

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 884

HARRY SACHER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court denying petitioner's motion to dismiss the indictment (R. 75–78) is reported at 139 F. Supp. 853. The opinion of the District Court (R. 64–74) rendered in conjunction with its verdict finding petitioner guilty as charged (a jury having been waived) is reported at 139 F. Supp. 855. The opinion of the Court of Appeals is reported at 240 F. 2d 46 and also appears as Appendix B to the petition for a writ of certiorari (Pet. 64–76).

JURISDICTION

The judgment of the Court of Appeals (see Pet. 63) was entered on January 3, 1957, and a petition

for rehearing was denied on February 6, 1957. By order of Mr. Chief Justice Warren, the time for filing a petition for a writ of certiorari was extended to April 5, 1957, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether, in an inquiry by a congressional committee into a subject (the *Matusow* recantations) to which the question of whether petitioner was, or ever had been, a member of the Communist Party was clearly pertinent, petitioner's refusal to answer was a refusal to answer a question "pertinent to the question under inquiry" within the meaning of 2 U. S. C. 192, notwithstanding the fact that the question was explained as being relevant to the consideration of a bill to disqualify members of the Communist Party from practicing law.

2. Whether, even assuming that petitioner's refusal to answer whether he was or ever had been a member of the Communist Party was not a refusal to answer a question "pertinent to the question under inquiry" because of the circumstances stated in the preceding question, his later refusal to answer whether he was or ever had been a member of the Lawyers' Section of the Communist Party (which question was also pertinent to the main subject of inquiry, the *Matusow* recantations) was not a refusal to answer a question "pertinent to the question under inquiry," where the committee, when the latter question was

asked, was certainly concerned with the main subject of inquiry.

3. Whether the indictment is fatally defective in that —

(*a*) it allegedly fails to state that the "question under inquiry" was within the committee's delegated authority (this question is raised for the first time in this Court);

(*b*) it allegedly fails to specify the "question under inquiry" to which the questions which petitioner refused to answer were pertinent (this question was not raised in or passed upon by the Court of Appeals);

(*c*) it fails to aver specifically that the refusals to answer were "willful."

4. Whether the requirement of answers to the question relating to petitioner's membership in the Communist Party violated his rights under the First Amendment.

5. Whether the Resolution (S. Res. 366, 81st Congress) defining the powers of the Senate Internal Security Subcommittee is unconstitutionally vague.

6. Whether the trial court erred in denying a motion for a hearing to determine whether the votes of any of the government employees on the grand jury, of whom there were eleven, were necessary to the return of the indictment, and, if so, further to determine whether the indictment was invalid because government employees are biased as a class in cases involving any aspect of Communism (this question was not raised in or passed upon by the Court of Appeals).

STATUTE AND RESOLUTION INVOLVED

2 U. S. C. 192 (R. S. 102, as amended) provides:

Every person who having been summoned as a witness by the authority of either House of Congress, to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

S. Res. 366, 81st Cong., 2d sess. (1950) (96 Cong. Rec. 16872) provides in pertinent part:

Resolved, That the Committee on the Judiciary, or any duly authorized subcommittee thereof, is authorized and directed to make a complete and continuing study and investigation of (1) the administration, operation, and enforcement of the Internal Security Act of 1950; (2) the administration, operation, and enforcement of other laws relating to espionage, sabotage, and the protection of the internal security of the United States; and (3) the extent, nature, and effects of subversive activities in the United States, its Territories and possessions, including, but not limited to, espionage, sabotage, and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world Communist movement or any other movement seeking to overthrow the Government of the United States by force and violence.[1]

[1] The resolution was introduced in evidence as G. Ex. 1 (Tr. 17) and its full text is set forth in the printed Record at pages 80–82.

STATEMENT

On December 21, 1955, petitioner was charged in a three-count indictment (R. 2–3), returned in the United States District Court for the District of Columbia, with having refused, in violation of 2 U. S. C. 192 (*supra*, p. 4), to answer three questions, pertinent to the matter under inquiry, put to him by a subcommittee of the Internal Security Subcommittee of the Senate Committee on the Judiciary, *viz.*, whether he then was or ever had been a member of the Communist Party (counts 1 and 2) and whether he then was or ever had been a member of the "lawyers' Section" of that organization (count 3). Petitioner, having waived his right to a trial by jury (Tr. 3–4), was found guilty on all counts and was sentenced generally to six months' imprisonment and to pay a fine of $1,000 (R. 10). On appeal to the Court of Appeals for the District of Columbia Circuit, the judgment of conviction was affirmed.

The pertinent facts may be summarized as follows:

On several occasions during the year 1952, Harvey Matusow appeared as a witness before the Internal Security Subcommittee of the Senate Committee on the Judiciary and gave sworn testimony concerning, among other subjects, the International Union of Mine, Mill and Smelter Workers (R. 100)—subsequently to be described by the Subcommittee as "Communist controlled" (G. Ex. 12, p. 79). In or about February 1955, Matusow publicly recanted this and other testimony given by him in other proceedings, saying that he had "lied when he testified before this subcommittee and on other occasions" (R. 100).

On February 21, 1955 (R. 99), the Subcommittee commenced a series of hearings "to inquire into this whole matter" and to determine whether Matusow "told the truth in his original testimony before us and is now lying when he says that his original testimony was not the truth," or whether "part of what he told us was true and part was untrue," or whether "he never tells the truth by intent" (R. 100).

The Chairman of the Subcommittee, in opening the hearings, announced that the Subcommittee intended to determine whether Matusow might have been influenced, in making his recantations, by considerations of "low personal greed", or whether he had been the "victim of pressure brought by Communists" and others having "a vested interest in concealing the Communist conspiracy" and had "finally broken under this pressure", or whether there might be some other explanation (R. 100).

Petitioner, one of the witnesses called in the inquiry, appeared before the Subcommittee, presided over by Senator McClellan, on April 19, 1955 (R. 11).

Information and reports in the possession of the committee when it called petitioner.—At the time of petitioner's appearance, the committee had in its files "evidence indicative of the fact that this whole matter"—*i. e.*, the *Matusow* recantations—was part of "a conspiracy having as its primary purpose the discrediting of Government witnesses [in prosecutions against members of the Communist Party]" and "the securing of new trials for convicted Communists" (R. 30–31). It was part of this plan, according to the committee's information, that an effort was

to have been made to induce Matusow to execute affidavits recanting testimony previously given by him as a prosecution witness in the criminal trials of *Clinton Jencks* and *Elizabeth Gurley Flynn et al.* (R. 29–30); that, "[a]s a device to get Mr. Matusow to do this," Matusow was "to write a book," the "money to pay for" which was to be "provided through the Mine, Mill and Smelter Workers Union" (R. 30), and that the book was to be published by Cameron & Kahn, a publishing firm whose members were, according to the committee's information, both members of the Communist Party (R. 31–32, 36).

The committee's information further indicated that this plan had already been carried out to the extent that the book had been published (R. 30, 32), that it "contained chapters on the two trials" above referred to (R. 30), and that "[t]he affidavits [had been] prepared" and Matusow had been "induced to sign" them (*ibid.*). The committee further had information that Matusow's affidavit in the *Jencks* case "had been hatched by two attorneys", one of whom was Nathan Witt (*ibid.*); that petitioner "had received the [*Flynn* case] affidavit and certain other papers from Mr. Matusow" for use in applying for new trials for the defendants in that case, in which petitioner was of counsel (R. 31); and that the "entire Matusow proceeding, his recantation, the writing of the book, [and] the whole drive to discredit Government witnesses • • • were all the product of the planning of a group of lawyers within the Communist Party" (R. 33).

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The committee had, in addition, "information respecting Mr. Sacher's connections with Communist and Communist front organizations going back * * * to at least as early as 1937" (R. 14).[3] Among other such associations, the committee had information that petitioner had, in 1950, been present at a "birthday party for Alexander Bittelman", held at the New York headquarters of the Communist Party and "attended only by high functionaries" of the Party (R. 25), and that he had, in 1947, attended a meeting in Boston at the home of Angus Cameron (of the publishing firm which later published Matusow's book), which meeting was also attended by "a known Communist section leader" (R. 36).

The committee further had reports that there existed a "lawyers commission or a law commission of the Communist Party", consisting of "a group of high functionaries of the party to whom had been delegated the formulation * * * of legal strategy for the party"; that "included in that group were Nathan Witt and Harry Sacher"; and that "probably one of those two was the head of it" (R. 36).

Finally, at the time of petitioner's appearance, the committee was satisfied that money had been received by Matusow "out of the treasury [of] the Mine, Mill and Smelter Workers * * * through Nathan Witt and Cameron and Kahn" (R. 34–35).

The reason why petitioner was summoned to testify, according to the committee's counsel, was in

[3] Details of these Communist and Communist-front associations, all of which were in the committee's files, are set forth at R. 25–27 and in the opinion below at Pet. 68.

order to determine "to what extent he participated in the planning for the legal strategy of" the recantations (R. 35).

Thus, as noted by the Court of Appeals (see Pet. 69),—

> * * * when the Subcommittee called appellant as a witness, it had information as to the following: (a) reports linking appellant with the Communist Party; (b) reports linking the Communist Party with a conspiracy to bring about a recantation by Matusow of his testimony against the Communist Party and members thereof; and (c) reports linking appellant with this alleged conspiracy.

Petitioner's testimony at the hearing.—At the hearing, petitioner testified that he first met Matusow two days before the latter took the stand as a witness in support of a motion for a new trial in the *Flynn* case in the United States District Court for the Southern District of New York (R. 44); that he, petitioner, was one of the attorneys in the proceedings on the motion (*ibid.*); that, in connection with those proceedings, Matusow had given him numerous documents (R. 45, 48–48), including a copy of a 75-page report which he had some years previously given to the FBI and other agencies of the Government (R. 45), a diary recording events occurring over a period of several years in the recent past (R. 48), and papers used in the preparation of testimony given by him in a number of cases before the Subversive Activities Control Board (R. 49). Petitioner denied, however, having received from Matusow the affidavit of recantation used in the *Flynn* case (R. 49), denied

having had anything to do with the preparation of the affidavit (R. 50), and denied ever having discussed it with Witt prior to its execution (R. 49–50), but admitted that he may have discussed it with Witt following its execution, during the course of the *Flynn* proceedings, inasmuch as Witt, as counsel for Jencks, was interested in those proceedings (R. 50).

At this point in the proceedings, committee counsel asked petitioner whether he had "ever served a prison sentence" (R. 50). Petitioner asked the committee chairman, Senator McClellan, what the "purpose" of this question was (*ibid.*). In reply to the chairman's query as to the purpose of the question, counsel stated that "among the measures under consideration by this committee is proposed legislation for the purpose of fixing additional standards with respect to the practice of law in the Federal Courts", including legislation "which would prohibit members of the Communist Party from practicing law in Federal Courts", and that it was "germane to the consideration of such legislation to inquire into the circumstances involving the practice of law in Federal Courts by persons who are Communists" (R. 50–51). The chairman told counsel he "should lay a foundation for that first by asking the witness if he is a member of the Communist Party" (R. 51). Following a protest by petitioner that such an inquiry into his "political beliefs or associations" seemed to him to be "diversionary in character" (*ibid.*), he was nevertheless asked, and refused to answer, whether he then was or ever had been a member of the Communist Party (R. 52–53)—these being the questions on which counts 1 and

2 of the indictment are based (*supra*, p. 5). At that time he specifically disclaimed reliance on the Fifth Amendment.

The committee counsel thereupon once again asked petitioner whether he had "ever served a prison sentence" (R. 53), petitioner replying on this occasion that he had—a sentence for contempt of court (*ibid.*).

After a series of questions with respect to the petitioner's attendance at the 1950 birthday party for Alexander Bittelman (see *supra*, p. 8), petitioner was asked whether he had "any connection with the legal commission or law commission of the Communist Party" (R. 55). When petitioner replied that he did not "know of any such organization", he was asked whether he then was or ever had been "a member of the Lawyers' Section of the Communist Party" (*ibid.*). This is the question on which count 3 of the indictment is based (*supra*, p. 5). Petitioner replied (R. 55):

> Mr. Chairman, I have declined before and I decline again * * * [o]n the grounds that I have already stated * * *, and I reemphasize that there is nothing in the purposes of the committee or the Congress which comprehends the validity, the pertinency or the relevance of an inquiry to me concerning my political beliefs or affiliations. I respectfully decline to answer that question.

There followed a colloquy between petitioner and the committee chairman (R. 55–57) in the course of which petitioner made it emphatically clear that he would under no circumstances or conditions answer the pending question or any other question calculated to in-

quire into his "innermost thoughts and beliefs, whether they be on politics, religion or anything else" "on the grounds that it is incompatible with the dignity of the individual to make compulsory disclosure of his thoughts and his ideas and his beliefs" (R. 56; see also R. 57). On being ordered by the chairman to answer the question notwithstanding his objections, petitioner refused (R. 57).

ARGUMENT

1. Petitioner's principal contention (Pet. 24–40) is that the questions which he refused to answer and which form the bases of the three counts of the indictment (see *supra*, p. 5) "were not pertinent to a matter properly under inquiry" (Pet. 24). At no time did he rely on the Fifth Amendment.

"[T]he subject under inquiry"—*i. e.*, the matter of "the Matusow recantation" (R. 51)—"was clearly defined by the subcommittee", states petitioner, "and petitioner was specifically notified as to what that subject was at the time he was subpoenaed" (Pet. 31, citing R. 51). "When the inquiry took a turn into an area seemingly unrelated to the announced subject matter," continues the argument, "he raised the question of pertinency and then was presented with a new subject matter" (Pet. 31)—*i. e.*, the "measure under consideration by the subcommittee barring Communists from practice in the Federal courts" (Pet. 26; see *supra*, p. 10). Petitioner argues that the latter subject was not one which was properly before the committee for the reasons that (1) it was not germane to the committee's "announced investigative

purpose" (*i. e.*, the *Matusow* matter), (2) "[t]he two members of the subcommittee present at the time of petitioner's appearance did not possess the authority to change the subject matter under inquiry", and (3) the newly-announced subject—described by petitioner as proposed legislation "in the area of political qualifications for admission to the Federal bar"—is in any event "beyond the power of Congress" to enact (Pet. 37).

Petitioner concludes that, since an essential element of the offense defined by 2 U. S. C. 192 (*supra*, p. 4) is that the question which the accused is charged with having unlawfully refused to answer be one that is "pertinent to the question under inquiry", his conviction cannot stand (Pet. 24–25).

It is submitted that the argument fails adequately to take into account the facts of record, and that, even assuming, *arguendo*, the invalidity of petitioner's conviction on the first two counts, the assumed defect does not affect his conviction on the third, which suffices to sustain the general sentence which petitioner received (see *supra*, p. 5). *Claassen* v. *United States*, 142 U. S. 140, 146–147; *United States* v. *Trenton Potteries*, 273 U. S. 392, 401–402; cf. *Hirabayashi* v. *United States*, 320 U. S. 81, 85, 105; *Pinkerton* v. *United States*, 328 U. S. 640, 641–642, fn. 1.

(*a*) As noted by the court below, it is unnecessary in this case to "reach the question of whether the subcommittee could enlarge the scope of the inquiry" or "the propriety of a line of inquiry concerning practice of law by Communists" (Pet. 74). For, as the court below observed, "[a]ssuming, *arguendo*,

that the subject of practice of law by a Communist Party member was beyond the power and authority of the Subcommittee, the absence of authority to inquire into that area cannot affect the inquiries properly made and pertinent to other authorized subjects being actively pursued by the Subcommittee" (Pet. 74–75). Since, as the court further noted, "[e]arly in the hearing the Subcommittee Chairman notified Sacher that the 'primary purpose of this testimony is to establish a relationship or contact you have had with Mr. Matusow * * *' [see R. 46]", "the question whether Sacher's activities in relation to Matusow and his recantation were purely professional or whether they were motivated by Sacher's involvement in a suspected Communist conspiracy was pertinent to the plainly announced subject of inquiry. There was no abandonment of the 'Matusow Case' inquiry by reason of the brief excursion into discussion of possible legislation relating to law practice" (Pet. 75).

Under this view, which we submit is sound, petitioner's convictions on all three of the counts are valid. The questions involved in all three of the counts relate to membership in the Communist Party, and the question of whether petitioner was a member of the Party was clearly germane to whether he was a party to a "Communist conspiracy" to produce false recantations by Matusow, the basic subject of inquiry.

(*b*) But even if the pertinence of the first two questions could be attacked on the ground that they were asked while the committee was digressing from

the *Matusow* matter to the possibility of legislation relating to law practice, this could in nowise affect the last question, which was the basis for the third count. When the question and refusal on which that count is based took place, the discussion of legislation on law practice had clearly ended. The inquiry had as of that time returned to the subject of the *Matusow* matter (assuming, indeed, contrary to the view of the court below—which we urge is correct—there was even a temporary abandonment of the *Matusow* matter). For, the committee's digression certainly ended when petitioner was asked for the second time (and he this time answered) the question of whether he had "ever served a prison sentence" (*supra,* p. 11)—this having been the question which precipitated the "excursion" in the first place (see *supra,* pp. 10–11). The question on which count 3 is based—whether petitioner was or ever had been a member of the "Lawyers' Section of the Communist Party"—was not asked until some time thereafter (*supra,* p. 11). In the meantime the inquiry had definitely returned to the *Matusow* affair with the series of questions relating to whether petitioner had attended the 1950 Bittleman party (*supra,* p. 11; see R. 54–55).[3] The question which was the basis for count 3 was manifestly germane to the *Matusow* investigation, as the facts related above, *supra,* pp. 5–11, demonstrate.

In short, even assuming, *arguendo,* that the committee's digression was thought to have the effect of rendering invalid petitioner's convictions under

[3] Petitioner concedes that the questions relating to the Bittelman party were germane to the *Matusow* inquiry. He states

the first two counts of the indictment (because the questions underlying those counts were asked in the course of that "excursion"), the third-count conviction is not subject to the same attack because the question and refusal on which it is based indisputably took place after the committee had resumed the main subject of the inquiry, the circumstances surrounding the *Matusow* recantations. This being the case, petitioner's general sentence, being within the limits of the punishment properly imposable under the third count, stands unaffected by petitioner's challenge. See cases cited *supra,* p. 13.

(*c*) Finally, it is perfectly clear from the record (see, especially, *supra,* pp. 11–12) that petitioner's refusals to answer questions relating to his Communist affiliations were absolute and unconditional. He refused "categorically", he told the chairman, to discuss his "political" beliefs (which he equated to answering questions pertaining to his Communist affiliations) because to do so was "inconsistent with the dignity of any man" (R. 52). There was, he said, "*nothing* in

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that "the subcommittee did not, *with a single exception* (R. 25, 54–55), address any questions to petitioner at the hearing concerning the sundry matters which Mr. Sourwine testified were of interest to the subcommittee and constituted a reason for calling him" (Pet. 35, emphasis added). While we deny this statement—among other matters which were testified to by Sourwine as having been of interest to the subcommittee in connection with petitioner's relations with Matusow, and which the committee questioned petitioner about, was the matter of petitioner's visit at the home of Angus Cameron, co-publisher of Matusow's book (see *supra,* p. 8, and R. 57–58)—the "single exception" to which petitioner refers (as evidenced by the record references (R. 25, 54–55) which he supplies, *supra*) is the matter of the Bittelman party.

the purposes of the committee *or the Congress* which comprehends the validity, the pertinency or the relevance of an inquiry to me concerning my political beliefs or affiliations" (R. 55, emphasis added). It is plain from these and other remarks of petitioner at the hearing (see R. 51–53, 55–57) that petitioner was not basing his refusals to answer on the fact, if it was a fact, that the committee had temporarily departed from the main subject of the inquiry. He did not, in other words, tie his refusals to answer to the fact of the committee's "brief excursion". His refusals were unqualified and unconditional. His present arguments with respect to pertinency are afterthoughts, which have no apparent relation to his conduct at the hearing. There can be no doubt, we submit, of the relevance of the questions respecting petitioner's Communist affiliations to the committee's inquiry into the Matusow affair (see *supra*, pp. 5–11, 13–14).[4] Hence, it is probable that, had petitioner signified to the committee that one of the reasons why he was declining to answer was the fact that (or his belief that) the questions being asked purported to relate to a matter other than the *Matusow* inquiry, the committee chairman would have specifically related the questions to that inquiry. Petitioner, of course, did nothing of the sort. His present efforts to escape punishment on the basis of objections which could have been met if they had been raised at the proper time should therefore fail.

[4] For this reason, there is clearly no warrant for petitioner's assertion that the questions propounded to him at the hearing were designed "for the purpose of doing him injury" (Pet. 59).

2. Petitioner next contends that the indictment is fatally defective on three grounds (Pet. 40–53).

(*a*) The contention (Pet. 42–45) that the indictment is defective for "failure to allege that the question under inquiry was within the subcommittee's delegated authority" (Pet. 42) is made for the first time in this Court, and in any event is without merit. The indictment (R. 2–3) incorporates by reference Senate Resolution 366, 81st Cong., 2d sess. (*supra*, p. 4), the source of the Subcommittee's authority. This was the equivalent of alleging that the subject under inquiry was within the committee's delegated authority. Furthermore, there is manifestly no basis for a claim of prejudice. Hence, under Rule 52 (a), F. R. Crim. P.,[5] the defect (even if one existed) must be disregarded. See also *United States* v. *Debrow*, 346 U. S. 374, 377–8.

(*b*) The contention (Pet. 45–52) that the indictment is fatally defective for "failure to specify the matter under inquiry to which the questions put to petitioner are said to be pertinent" (Pet. 45) was not raised in or passed upon by the Court of Appeals, and is, like the preceding contention, in any event without substance.

Petitioner admitted at the hearing before the committee that he knew and understood that the subject of inquiry was "the Matusow recantation" (R. 51), and the committee chairman informed him, moreover, that "[t]he primary purpose of this testimony is to establish a relationship or contact you have had with

[5] Rule 52 (a) provides that "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

Mr. Matusow, whom this committee is investigating * * *'" (R. 46). Petitioner, furthermore, concededly had access before trial to the minutes of the hearing at which the refusals in question took place (R. 79–80), so that any suggestion that he was unaware of what the "matter under inquiry" was would be clearly untenable. Under Rule 52 (a), F. R. Crim. P., therefore (see fn. 5, *supra*, p. 18), the alleged defect, even if one existed, should be disregarded. See also *Hagner* v. *United States*, 285 U. S. 427, 431.

(*c*) Petitioner's final contention with respect to the sufficiency of the indictment (Pet. 52–53)—that it is fatally deficient for "failure to allege that petitioner acted wilfully" (Pet. 52)—is the same in substance as a contention advanced in *Barenblatt* v. *United States*, pending on petition for a writ of certiorari, No. 742, this Term. As we point out in our brief in opposition in that case (pp. 16–17), the indictment does charge that petitioner "unlawfully refused to answer" certain questions (R. 2). For the refusals to have been unlawful, they had to be deliberate. *Quinn* v. *United States*, 349 U. S. 155, 165–166. The intentional character of the refusals was thus implicitly charged. *United States* v. *Deutch*, 235 F. 2d 853 (C. A. D. C.).

3. Also without merit is petitioner's contention (Pet. 53–55) that his conviction violates the "constitutional protections against compulsory disclosures of political affiliation" (Pet. 53).

"If", as the court below wrote, "it is proper, as appellant concedes, to investigate whether there ex-

isted 'a general conspiracy to discredit government informers in the field of Communism,' it was pertinent to question appellant as to his membership and participation in the group believed to have formed the conspiracy" (Pet. 70–71). Particularly is this true where, as here, the particular subject of inquiry is the circumstances surrounding the recantation by a witness, who has appeared in the recent past before the committee conducting the inquiry, of important testimony given by the witness before (among other bodies) the very committee conducting the inquiry.

Petitioner concedes that the exaction by a congressional committee of "disclosures in the area of the First Amendment" is permissible if the compelled disclosures are, "in the context of the hearing, sufficiently connected with the inquiry to justify" them (Pet. 54). This concession is enough, by itself, to dispose of the present contention. For even assuming, *arguendo,* that compulsory disclosure of membership in or affiliation with the Communist Party is a disclosure "in the area of the First Amendment",* the record in this case fully supports the existence of a rational connection between the disclosures which were here sought to be exacted and the subject of the committee's inquiry (see *supra,* pp. 5–11, 13–14).

* See, however, pp. 61–68 of our brief on the merits in *Watkins* v. *United States*, pending on writ of certiorari, No. 261, this Term, where authorities are collected in support of the proposition that a witness before a congressional committee inquiring into some aspect of the subject of Communism in which it has a legitimate interest has no right under the First Amendment to decline to disclose whether he is or has been a member of the Communist Party.

4. It is next argued (Pet. 55–58) that "[t]he resolution establishing the subcommittee"—Senate Resolution 366, 81st Congress (*supra,* p. 4)—is unconstitutional as herein applied because it is "hopelessly vague" (Pet. 55, 56).

Assuming, *arguendo,* that petitioner is correct in his assumption (see Pet. 56) that only the third clause of the resolution is applicable here, his argument is nevertheless without substance. Clause 3 confers on the committee the power to make a "complete and continuing study and investigation" of "(3) the extent, nature, and effects of subversive activities in the United States, * * * including, but not limited to, espionage, sabotage, and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world Communist movement or any other movement seeking to overthrow the Government of the United States by force and violence." Thus, in its context, the phrase "subversive activities" is not, as petitioner argues, left at large so as to provide "no guide" as to "what is being overturned" or subverted, with the result that the resolution is "left without meaningful boundaries" (Pet. 56). The resolution, as recognized by the court below (Pet. 76), is certainly no more general or vague than the resolution establishing the House Committee on Un-American Activities, which authorizes that committee to investigate "(i) the extent, character, and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from

foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation."'[7] And the latter resolution has been repeatedly sustained by the courts as against challenges based on alleged vagueness.[8]

5. Petitioner's final contention is that it was error for the trial court to refuse him a hearing (R. 4–9) for the purpose of determining whether "the votes of Government employees or wives of Government employees were necessary to return the indictment" and, if so, whether the votes of such employees or wives may have been the result of "bias" arising from "a climate of opinion among Government employees that they would jeopardize their tenure or provoke investigation by failing to indict petitioner at the Government's request" (Pet. 58). This was not raised in, or passed upon by, the Court of Appeals. The point was thus waived by petitioner.[9]

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[7] H. Res. 5, 79th Cong., 1st sess. (1945) (91 Cong. Rec. 10), subsequently made a standing Rule of the House (Rule XI (1) (q) (2), as amended by the Legislative Reorganization Act of 1946, c. 753, § 121, 60 Stat. 812, 823, 828).

[8] The cases are collected at p. 70 of the Government's brief on the merits in *Watkins* v. *United States*, pending on writ of certiorari, No. 261, this Term. The validity of the House resolution (read together with 2 U. S. C. 192) is among the issues in *Watkins*. The Government's brief in that case, at pp. 71–73, summarizes our arguments on the point.

[9] In any event, the point is without merit. Substantially the same issue was involved but not reached in *Quinn* v. *United States*, 349 U. S. 155 (see *id.* at 170), *Emspak* v. *United States*, 349 U. S. 190 (see *id.* at 202), and *Gold* v. *United States*, 352 U. S. 985, and is likewise involved in *Watkins* v. *United*

CONCLUSION

The case was correctly decided and no conflict of decisions is presented. The case is to be distinguished from *Watkins* v. *United States,* pending on writ of certiorari, No. 261, this Term, and from *Barenblatt* v. *United States,* pending on petition for a writ of certiorari, No. 742, this Term, in that it presents, not the issue of whether the committee in question was acting pursuant to a valid legislative purpose in its general questioning of petitioner (petitioner does not suggest the contrary), but of whether the particular questions which he refused to answer were "pertinent to the question under inquiry", as required by 2 U. S. C. 192. We have pointed out above that they were, and certainly that one of them was, which is all that is necessary to sustain the conviction.

For the reasons given above, it is submitted that the petition for a writ of certiorari should be denied.

In our view, only one issue properly raised herein is, or may be, common to the *Watkins* case—the First Amendment question, discussed at pp. 19–20, *supra.*

States, pending on writ of certiorari, No. 261, this Term. Our *Watkins* brief, p. 75, adopts by reference our arguments on the point as set forth in our *Gold* brief, No. 137, this Term, pp. 123–138, to which, accordingly, we refer the Court for our reply on the merits.

It should be pointed out, furthermore, that, inasmuch as the *fact* of petitioner's refusals to answer is undisputed, the instant case (like *Watkins*, *Quinn*, and *Emspak*) is distinguishable from *Gold* to petitioner's disadvantage. See pp. 75–76 of our *Watkins* brief. An additional distinction, likewise to petitioner's disadvantage, is that, as he concedes, he "was unable to show that more than [eleven] grand jurors were Government employees" (Pet. 58), so that no Government employee's vote was shown to have been necessary to indict.

While we believe petitioner's arguments on this issue to have no merit, the Court may wish to withhold action on the petition until the disposition of the *Watkins* case.

Respectfully submitted.

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MAY 1957.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 884

HARRY SACHER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY TO GOVERNMENT'S OPPOSITION

The Government's Opposition Emphasizes the Necessity for Review

The government's Opposition arms our case with new reasons for review. The government acknowledges that only the subcommittee's statement of purpose confining the hearing to an investigation of the credibility of Matusow can justify the pertinency of the questions in issue. It contends that while there might be doubt as to the pertinency of two of the questions involved here, the third question was pertinent to the credibility of Matusow (Opp. 14-15). This contention thus abandons the position of the trial court that the resolution broadly defining the jurisdiction of the subcommittee is the measure of per-

tinency both for the purpose of weighing the admissibility of evidence as well as for the purpose of determining the petitioner's innocence or guilt (R. 70, Pet. 34). Imbedded in this problem is a conflict as to the meaning of the statutory phrase "question under inquiry". Does it mean the entire jurisdiction of a congressional committee, or merely that portion of it which is invoked at the hearing at which the witness appears? Not only were the trial court and the court below in conflict on this point, but the government itself has shifted its position from the broad view which it adopted at the trial (R. 78-79).

Similarly the government now recognizes that the committee's disavowal of its announced subject matter as a basis for pertinency cannot be disregarded. With respect to two of the questions it seems to hesitate to substitute its view for the subcommittee's concerning the basis for pertinency. It urges, however, that the third question was pertinent to the investigation of Matusow's credibility, although the subcommittee itself disavowed the Matusow matter as a reason for asking any of the three questions (Opp. 14-15). The court below found *de novo* that all of the questions in issue were pertinent to the credibility of Matusow and attached no legal consequences to the subcommittee's statement that that was not the reason the questions were asked (Pet. 75). But the theory of the trial court demanded as proof of pertinence only the establishment of the fact that the inquiry was into some form of alleged subversion.

What is the relationship between the justification for pertinency given to a witness at a hearing and that subsequently offered at the trial for contempt? May the committee at the trial offer a justification for pertinency which changes that stated to a witness at a hearing when he seeks a ruling on pertinency? The present answer of the government to this question seems to be an ambiguous "Yes and No". The answer of the court below seems

to be "Yes" (R. 64-70). And, as we have seen, the answer of the trial court is that it makes no difference in a case of this sort what the witness is told at the hearing or what the government proves at the trial, as long as the question is of a certain sort.

What are the rights of a witness who is informed by a committee chairman why a question is pertinent? The answer of the trial court seems to be that the witness must look behind the committee chairman's statement of pertinency to the language of the resolution itself, and if he is misled that is his own misfortune. The answer of the Court of Appeals is that the witness should consider whether the question might be pertinent to the announced matter under inquiry upon a ground not stated to him. The Court of Appeals also thought (Pet. 75) that when a witness indicates by his response to a question which is not pertinent that he might possibly decline to answer the question even if it were pertinent, he "showed his awareness of the risk involved"—whatever that may mean. Thus, according to the lower court, the witness' right to decline to answer questions not pertinent to the matter under inquiry depends upon his demonstrated willingness to answer questions which are pertinent. In a variant of this argument the government now seems to urge that petitioner somewhow either waived the requirement of pertinency or invited error by failing to press his objections with a requisite degree of vigor.

The government's response to our contentions with respect to the First Amendment really amounts to a reaffirmation of what may be called the "man on the street" formula which has grounded a host of convictions in the district court (see Appendix C). This formula asserts the legislative power to force anyone at random to make compulsory disclosure of whether he is or was a Communist or has had subversive associations. The legislative justification need at most be nominal.

Although the government makes various responses to our contentions with respect to the insufficiency of the indictment, it nowhere troubles to explain the anomaly which gives an individual charged under Section 192 in the Southern District of New York a reasonably informative indictment and a defendant in the District of Columbia, charged with the same offense, a loosely drawn and misleading one.

The issues which the government's Opposition has thus sharpened are common to a number of other cases. They should be authoritatively resolved for the guidance of the trial and appellate courts in the District of Columbia.*

Reply On the Issues of Pertinency

The government apparently concedes the validity of our contention that petitioner was erroneously convicted if all three of the questions in issue were deemed by the committee to be pertinent only to the subject matter of qualifications of lawyers. There is no answer at all to our contention that the inquiry into the credibility of Matusow could not legally be altered by the two members of the subcommittee who were present at the time of petitioner's appearance.

The government argues that all three questions were pertinent because they all "relate to membership in the Communist Party" and that issue was "clearly germane" to whether there was a Communist conspiracy to produce false recantations (Opp. 14). The difficulty with this argument, of course, is that the subcommittee chairman himself told the witness (Pet. 26; R. 51), in response to his request for a ruling on pertinency, that the questions were not germane to the announced subject matter.

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* See Petitioner, Appendix C and the two most recently reported cases, *United States* v. *Shelton*, 148 F. Supp. 926 (D. C. D. C.) and *United States* v. *Knowles*, 148 F. Supp. 832 (D. C. D. C.).

The government, apparently recognizing the difficulty involved in substituting its views on pertinency for the subcommittee's, seeks escape through the theory that even if the first two questions were not pertinent to the announced subject matter, the third question—relating to membership in the Lawyers' Section of the Communist Party—was pertinent. This theory is based upon the contention that the first two questions alone were asked in the course of a brief "excursion" into the unauthorized subject matter of political qualifications for lawyers (Opp. 15-16). According to the government, the third question was asked after the "excursion" had ended.

But, as the government itself concedes (Opp. 14), all three questions are unified by the same subject matter. They were all part of a single line of inquiry.* And the subcommittee's disavowal of the Matusow investigation as a ground for pertinency can only be read to apply to the entire line of inquiry.

The government contends (Opp. 13) that when petitioner was asked a second time (R. 50-53) whether he had ever served a prison sentence the subcommittee's "brief excursion", which had been launched when the question was initially asked, was ended and the inquiry reverted to an investigation of Matusow's credibility. But the record cannot be balkanized in this way. The record unambiguously falls into two quite distinct parts. The first portion deals with an exploration of petitioner's relationship to Matusow (R. 46-50). *This exploration was terminated after a series of questions dealing with petitioner's relationship to the Matusow matter* (R. 50). The committee then proceeded to investigate a wholly different subject matter for which it gave a wholly new justification. This new investigation and justification were never

* The cases are collected in *United States* v. *Emspak* (and nineteen others), 95 F. Supp. 1012 (D. C. D. C.).

abandoned or changed; there was no reversion to the Matusow inquiry.

The government's "excursion" theory is refuted not only by the record as a whole, but by each specific question which the subcommittee asked. The question about serving a prison sentence for contempt dealing as it does with sanctions against lawyers, on its face relates to the matter of qualifications to practice. When the question was originally asked (R. 50), Chairman McClellan signified both to the witness and to counsel for the subcommittee that it was not pertinent to the inquiry concerning Matusow's credibility. How could asking it twice make it more pertinent?

There is even less merit in the government's suggestion (Opp. 15), that if the prison question did not do so, the question whether petitioner had attended a birthday party in 1950 for one Alex Bittelman "definitely" restored the inquiry to the petitioner's complicity in the Matusow recantation of 1955. Manifestly the question about attendance at the birthday party in 1950 was in pursuance of an inquiry into petitioner's alleged past subversive associations which the committee itself thought beyond the scope of the Matusow inquiry.

Equally far-fetched is the government's statement (Opp. 15, ftn. 3) that the Petition concedes that the Bittelman question marked a reversion to the Matusow inquiry. In our Petition (at 35), we point to the fact that Mr. Sourwine at the trial gave many reasons for calling petitioner which were not mentioned at the hearing, and that one reason which is reflected both in the hearing and trial records was the attendance at the birthday party. The government argues as follows:

(a) the subcommittee asked about the Bittelman birthday party in 1950;

(b) Mr. Sourwine testified at the trial that the subcommittee was interested in petitioner's attendance at the Bittelman birthday party in 1950;

(c) the Petition recites "a" and "b".

Therefore petitioner has "conceded that the questions relating to the Bittelman party were germane to the Matusow inquiry."!

While the government strains mightily at so many straws to develop an argument that the answer to the question about the Lawyers' Section of the Community Party was demanded of the witness for a reason other than that for which the two preceding political questions were asked, it wholly disregards the specific ruling of the chairman on this point. When petitioner expressly challenged the pertinence of this very question (R. 55), did the chairman say that the inquiry into the qualifications for lawyers had ended some time earlier? Did he say that while he had found that the previous two question were not pertinent, he now "was certain what the purpose was" (R. 51) with relationship to the Matusow inquiry? Here is what he said (R. 55):

> "But when we come to the security of our country, an organization that is dedicated obviously to subversive purposes as an objective, I think it becomes the duty of the Congress of the United States and al-o the duty of the executive branch of the Government to try to ferret these things out and expose them if they relate directly to the national security—associations, at some time, and the knowledge of them, may help the Congress or help other officials of the Government to preserve national security. For that reason the Chair thinks that the question is proper and directs you to answer it."

Essaying still another tack (Opp. 17), the government urges that petitioner did not state that his refusals to an-

swer resulted from his belief that the questions in issue were not pertinent. But he is not required so to state.* In any event, petitioner did decline to answer each and all of the questions on the ground of the First Amendment and upon the further ground that (R. 52) "an inquiry to me concerning this matter is not pertinent to anything with which this committee is concerned, and is not relevant to any inquiry that may be properly made of me." And the specific question which the government now seeks to isolate from the rest of the inquiry, petitioner declined to answer (R. 55) "on the grounds I have already stated * * *."

Of a piece with the preceding argument is one that the questions were really pertinent and that if petitioner had indicated that lack of pertinency was one of the reasons for his refusal (Opp. 17), "it is probable that * * * the committee chairman would have specifically related the questions to that [Matusow inquiry]." This contention is not only groundless legally, but is factually mystifying. As we have seen, *supra*, when petitioner indicated that one of his reasons for declining to answer was his doubt as to pertinency, the committee did not relate the questions to the Matusow inquiry—"specifically" or otherwise.

What the government is really contending is that the committee was mistaken when it told petitioner the reason

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* See, for example, *Bowers* v. *United States*, 202 F. 2d 447, 452 (App. D. C.):

> "It may be suggested that, when Bowers was being examined before the subcommittee, he did not assign lack of pertinency as his reason for refusing to answer the seven questions, and so waived that defect. The answer to such a suggestion is that the right to refuse to answer a question which is not pertinent is not a personal privilege, such as the right to refrain from self-crimination, which is waived if not seasonably asserted; but that pertinency is an element of the criminal offense which must be shown by the prosecution."

why it demanded answers and that the petitioner was somehow at fault in failing to set the committee straight. But petitioner was under no duty to quarrel with the committee's statement of purpose, and the government cannot reject such a statement on the ground that it is "probable" that it "would have" been changed in a way more congenial to its present theory.* In *Watkins*, the government reminded the court over and over again that courts "should not go beyond the reasons officially given for conducting an inquiry thought necessary as preliminary to the passage of legislation" (Watkins Brief, p. 46; see, also, pp. 40-42, 47-48, 53). Surely the executive cannot ask the courts to pay a greater deference to the congressional judgment than it is willing to pay itself.

Reply on the First Amendment Issues

We do not agree with the government (Opp. 20) that the fact that the subcommittee was investigating the credibility of a witness who had appeared before it three years earlier supplies a greater justification for invading petitioner's rights under the First Amendment than in the case of an inquiry to gather facts for the purpose of passing a law.

The investigation by a congressional committee into the credibility of a witness is an aspect of the congressional jurisdiction to protect the integrity of its own processes. This power has a quasi-judicial resonance. It is precisely this aspect of the power of compulsory process which is subject to the limitation of "the least possible power adequate to the end proposed." *Anderson* v. *Dunn*, 6 Wheat. 204, 231; *Marshall* v. *Gordon*, 243 U. S. 521, 541; and see

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* Apparently the government thinks that proof of "probable" violation of the contempt statute meets the standard of the criminal law. Review should be granted to eliminate this theory from the administration of the contempt statute (Pet. 59-60).

the Government Brief in *Watkins*, at pp. 52-53.* But wholly apart from the nature of the congressional jurisdiction exerted here is the fact that none of the lower courts applied the standards of adjudication which are appropriate to constitutional cases. And our answer to the government's suggestion (Opp. 20) that the questions in issue were rationally connected with the matter under inquiry, is first that the committee itself did not think that they were, second, that the tortured defense of their pertinency itself makes this more than doubtful, and third, that if the First Amendment is to have meaning in this area, there must be a pressing, legislative need for the information involved, before a witness can be deprived of a basic right by which we live as a people.

Reply to Contentions With Respect to the Insufficiency of the Indictment

All our contentions concerning the insufficiency of the indictment are embraced within the broadly phrased motion to dismiss (R. 3). Those contentions which were not raised in the Court of Appeals were not waived, where, as here, the prejudicial injury to the defense is manifest (Pet. 45, 48). See *Hagner* v. *United States*, 285 U. S. 427; *Butzman* v. *United States*, 205 F. 2d 343, 348 (C. A. 6); *Gariepy* v. *United States*, 189 F. 2d 459 (C. A. 6); *Risken* v. *United States*, 197 F. 2d 959 (C. A. 8).

A reference in the indictment to Senate Resolution 366 patently fails to allege, contrary to the government's con-

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* The government seeks to stress the importance of the investigation by stating that Matusow had "appeared in the recent past before the subcommittee" (Opp. 20). Actually, as the government Opposition itself recites (at 5), Matusow had appeared as a witness in 1952, some three years prior to his recantation. Besides, Matusow's testimony about the Smelter Workers' Union which was allegedly being probed (R. 99-100) had already produced legislative issue in Section 10 of the Communist Control Act of 1954 (68 Stat. 778; Subversive Activities Control Act, Section 13A).

tention (Opp. 18), that the particular question under inquiry was within the subcommittee's delegated authority.* And we are at a loss to understand how the government can urge (Opp. 18-19), that petitioner was not prejudiced by the lack of an allegation of the subject matter under inquiry when the trial court itself, following the line of the indictment, made the resolution, and not the matter under inquiry, the test of pertinency. How could petitioner have been more prejudiced?

Reply On the Issue of Vagueness of the Indictment

In both *Watkins* and *Emspak*, the government contended that the possible vagueness of the resolution creating the House Un-American Activities Committee was redeemed by the specificity of the matter under inquiry (Pet. 32). The instant resolution is even more vague than the House Committee Resolution (Pet. 57-58), and as the government's "brief excursion" theory describes the manner in which the matter under inquiry mysteriously disappears and reemerges, it could hardly impose constitutionally definite contours upon the resolution.

Reply On the Issues of a Fair and Impartial Grand Jury

The government's brief response to our contention concerning the composition of the grand jury rests upon two errors. In the first place, this point was raised in the

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* Indeed the government never established the subcommittee's authority by delegation from the Judiciary Committee. It offered a resolution of the Judiciary Committee (GE 2, pp. 82-83), purporting to continue some prior action, but this resolution does not purport to show the scope of the original delegation of authority. The record is thus utterly silent on the subject of the initial delegation of authority to the subcommittee.

Court of Appeals and was not waived.* In the second place, the Grand Jury had to decide whether petitioner wilfully refused to answer a question pertinent to a matter then under inquiry. This was hardly a purely ministerial disposition of an undisputed fact, as the government's own struggles with the problem of pertinency so graphically demonstrate.

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* Petitioner's brief below states (at p. 13, footnote 6):

"This Court has decided the issue of the qualifications of government employees to sit on a grand jury in a case charging contempt of Congress, contrary to the contentions of the appellant. *Emspak* v. *United States*, 91 App. D. C. 378, 203 F. 2d 54. The issue, however, has never been passed upon by the Supreme Court, *Quinn* v. *United States*, 349 U. S. 155, 170. Accordingly, while saving this point, we do not brief it herein."

No. 884. SACHER *v.* UNITED STATES. On petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. *Per Curiam:* The petition for writ of certiorari in this case is granted. The judgment of the Court of Appeals for the District of Columbia Circuit is vacated and the case is remanded for consideration in light of *Watkins* v. *United States*, 354 U. S. 178. MR. JUSTICE BURTON took no part in the consideration or decision of this case. MR. JUSTICE CLARK dissents for the reasons stated in his dissenting opinion in *Watkins* v. *United States*, *supra*. *Frank J. Donner* and

David Rein for petitioner. *Solicitor General Rankin, Assistant Attorney General Tompkins, Harold D. Koffsky, Philip R. Monahan* and *Doris H. Spangenburg* for the United States. Reported below: 99 U. S. App. D. C. 360, 240 F. 2d 46.